

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 16-11700-smb

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5 In the Matter of:

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7 GAWKER MEDIA, LLC,

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9 Debtor.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

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16 July 7, 2016

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23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Initial Case Conference

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3 Hearing re: Case Management Motion. Debtors' Motion for
4 Entry of an Order Establishing Certain Notice, Case
5 Management, and Administrative Procedures and Omnibus
6 Hearing Dates. [Docket No. 11]

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8 Hearing re: Cash Management Motion. Debtors' Motion for
9 Entry of Interim and Final Orders Authorizing the Debtors to
10 Continue Using the Debtors' Bank Accounts, Business Forms,
11 and Cash Management System and Granting Related Relief.
12 [Docket No. 12]

13

14 Hearing re: Wages Motion. Debtors' Motion for Entry of
15 Interim and Final Orders (I) Authorizing, but Not Directing,
16 Payment of Prepetition Wages, Salaries, Business Expenses,
17 Employee Benefits and Related Items, and (II) Directing All
18 Financial Institutions to Honor Checks for Payment of Such
19 Obligations. [Docket No. 13]

20

21 Hearing re: Taxes Motion. Debtors' Motion for Entry of
22 Interim and Final Orders Authorizing Payment of Income
23 Taxes, Property Taxes, Sales and Use Taxes and Hungarian
24 Taxes. [Docket No. 14]

25

1 Hearing re: Insurance Motion. Debtors' Motion for Entry of
2 Interim and Final Orders Authorizing, but Not Directing, the
3 Debtors to (A) Continue Insurance Coverage Entered into
4 Prepetition, (B) Renew or Purchase New Insurance Policies in
5 the Ordinary Course of Business, and (C) Pay All Prepetition
6 Obligations Relating Thereto. [Docket No. 16]

7
8 Hearing re: Utilities Motion. Debtors' Motion for Entry of
9 an Order (A) Prohibiting Utility Companies from
10 Discontinuing, Altering, or Refusing Service, (B) Deeming
11 Utility Companies to Have Adequate Assurance of Payment, and
12 (C) Establishing Procedures for Resolving Requests for
13 Additional Assurance. [Docket No. 17]

14
15 Hearing re: DIP Motion. Debtors' Motion for Entry of
16 Interim and Final Orders Pursuant to 11 U.S.C. §
17 105, 361, 362, 363, and 364 and Rules 2002, 4001, and 9014
18 of the Federal Rules of Bankruptcy Procedure (I) Authorizing
19 Incurrence by the Debtors of Postpetition Secured
20 Indebtedness, (II) Granting Liens, (III) Authorizing Use of
21 Cash Collateral by the Debtors and Providing for Adequate
22 Protection, (IV) Modifying the Automatic Stay, and (V)
23 Scheduling a Final Hearing. [Docket No. 19]

1 Hearing re: Critical Vendors Motion. Debtors' Motion for
2 Entry of Interim and Final Orders Authorizing the Debtors to
3 Pay Prepetition Claims of Critical Vendors and Foreign
4 Vendors. [Docket No. 15]

5

6 Hearing re: Interim Compensation Motion. Debtors' Motion
7 for Entry of an Order Establishing Procedures for Interim
8 Compensation and Reimbursement of Expenses of Professionals.
9 [Docket No. 52]

10

11 Hearing re: Ordinary Course Professionals Motion. Debtors'
12 Motion for Entry of an Order Authorizing the Retention and
13 Compensation of Certain Professionals Utilized in the
14 Ordinary Course of Business. [Docket No. 53]

15

16 Hearing re: Noticing Agent Application. Debtors'
17 Application Pursuant to 28 U.S.C. § 156(c), 11 U.S.C. §
18 503(b)(1)(A), and Local Rule 5075-1 For Entry of an Order
19 Appointing Prime Clerk LLC as Claims and Noticing Agent Nunc
20 Pro Tunc To The Petition Date. [Docket No. 25]

21

22 Hearing re: Prime Clerk Retention Application. Debtors'
23 Application Pursuant to 11 U.S.C. § 327(a), Fed. R. Bankr.
24 P. 2014(a) and Local Rules 2014-1 and 2016-1 for Entry of an
25 order Appointing Prime Clerk LLC as Administrative Advisor

1 Nunc Pro Tunc To the Petition Date. [Docket No. 26]

2

3 Hearing re: Opportune Retention Application. Debtors'

4 Application Pursuant to Bankruptcy Code Sections 105(a) and

5 363(b) for Entry of an Order Authorizing the Debtors to (I)

6 Retain Opportune LLP to Provide the Debtors with a Chief

7 Restructuring Officer and Certain Additional Personnel, and

8 (II) Designate William D. Holden as Chief Restructuring

9 Officer for the Debtors, Nunc Pro Tunc to the Petition Date.

10 [Docket No. 55]

11

12 Hearing re: Ropes & Gray Retention Application. Debtors'

13 Application for Entry of an Order Authorizing the Retention

14 and Employment of Ropes & Gray LLP as Attorneys for the

15 Debtors and Debtors in Possession Effective Nunc Pro Tunc to

16 the Petition Date. [Docket No. 57]

17

18 Hearing re: Houlihan Lokey Retention Application. Debtors'

19 Application for Entry of an Order Authorizing the Debtors to

20 Retain Houlihan Lokey as Investment Banker for the Debtors

21 Nunc Pro Tunc to the Petition Date. [Docket No. 58]

22

23 Hearing re: Sale Motion. Debtors' Motion for (I) An Order

24 (A) Authorizing and Approving Bidding Procedures, Breakup

25 Fee and Expense Reimbursement, (B) Authorizing and Approving

1 the Debtors' Entry into and Assumption of the Stalking Horse
2 Asset Purchase Agreement, (C) Approving Notice Procedures,
3 (D) Scheduling a Sale Hearing and (E) Approving Procedures
4 for Assumption and Assignment of Certain Contracts and
5 Leases and Determining Cure Amounts and (II) An Order (A)
6 Authorizing the Sale of Substantially All of the Debtors'
7 Assets Free and Clear of All Claims, Liens, Rights,
8 Interests and Encumbrances, (B) Approving the Asset
9 Purchase Agreement and (C) Authorizing the Debtors to Assume
10 and Assign Certain Executory Contracts and Unexpired Leases.

11 [Docket No. 21]

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25 Transcribed by: Sonya Ledanski Hyde

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9 ALSO PRESENT TELEPHONICALLY:
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12 KATY PAPE
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P R O C E E D I N G S

THE COURT: Gawker.

MR. GALARDI: Good afternoon, Your Honor. For the record, Greg Galardi of Ropes & Gray on behalf of Gawker Media, LLC and the other related Debtors. Your Honor, we have forwarded to Your Honor an agenda, and I also understand that today is the day to give Your Honor a status conference.

So what I'd like to do is first start with a little bit of status conference of what (indiscernible) brings us today, and then I'll turn over many of the matters on the agenda to my colleague, Ms. Alexander, and then I'll be back to deal with a few of the matters.

First, with respect to the status, Your Honor, although they've been here before on a discovery matter, I just want to go back to -- the Committee was appointed on June 24th that consists of three members. Three of those -- all three members have contingent litigation claims against the Gawker Media, LLC. They are represented and retained the counsel of Simpson Tacher, who is to my right, who introduced themselves to Your Honor at that discovery conference. And then they have also retained the services of Deloitte as the financial advisor.

Your Honor, they hit the ground running and within the -- after being retained for the weekend of the 25th and

1 also over the July 4th weekend, we've worked very
2 cooperatively and consensually with them so as Your Honor
3 will see on the agenda, there is really no contested matter
4 going forward today, although there will be a series of
5 revised orders that reflect comments from the Committee's
6 counsel as well as some from the U.S. Trustee's counsel.

7 And with their working over that first weekend, we
8 did manage to adjourn, as Your Honor may recall. There was
9 an initial bid procedures hearing scheduled for that Monday.
10 I believe the day was the 27th. They have asked for an
11 extension and are potential acquirers, if Davis agreed to
12 that extension to today's hearing so that we can work
13 through the matters. And that time was well spent with
14 respect to resolving issues on the bid procedures motions.
15 And I can walk through those later.

16 Again, Your Honor, as we has proceeded with these
17 cases, we have a -- our schedules and statements are due
18 July 14th. We may be -- and I think it'll be consensual
19 with all of the parties -- we may be seeking a few day
20 extension. The 341 meeting is scheduled presently for July
21 28th, and as we agreed with the U.S. Trustee, no matter what
22 extension we ask for, the schedules and statements will be
23 at least four business days prior to that July 28th date.
24 So that we expect to conduct the 341 in accordance with the
25 schedule.

1 Importantly, Your Honor, and as we get to later on
2 the bid procedures, there were earlier dates in the bid
3 procedures for a sale and auction. And, again, as a result
4 of the efforts of the Committee and with the consent of
5 Ziff-Davis and the Debtors participating, you will hear
6 later, there is schedule for the bid process that we'll ask
7 Your Honor to approve later on with respect to bid
8 procedures that would have the bid deadline now extended to
9 August 15th; an auction to be on August 16th; and ultimately
10 -- and Your Honor's clerks have accommodated us and
11 tentatively scheduled an August 18th at 2 p.m. hearing on
12 the sale for whoever is the successful bidder at that
13 auction.

14 Finally, Your Honor, as Your Honor is aware, the
15 other matter that is proceeding is the current dispute with
16 respect to the preliminary injunction that we sought on the
17 first day. Depositions were conducted -- three depositions,
18 about two hours, pursuant to Your Honor's order, were
19 conducted yesterday. I believe that there has been a brief
20 filed according to the scheduling order on the 5th of July.

21 Our firm will be filing a response, I believe it
22 is on the 11th of July, which is next Monday. And Your
23 Honor has that hearing scheduled for the 13th. That matter
24 has not been resolved and it's currently going to be going
25 forward.

1 Your Honor, that is the status of all the matters
2 going on with respect to this case. Unless Your Honor had
3 questions, I would turn the podium over to Ms. Alexander to
4 run through many of the first day motions and changes; and
5 then I'll return for the DIP, the sale, and a couple of
6 other matters.

7 THE COURT: Okay.

8 MR. GALARDI: Thank you, Your Honor.

9 THE COURT: Does anyone else want to be heard in
10 connection with the case conference? All right, the record
11 should reflect there's no response. Go ahead.

12 MS. ALEXANDER: Good afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 MS. ALEXANDER: Kristina Alexander of Ropes & Gray
15 for the Debtors. Your Honor, as Mr. Galardi said, after
16 working cooperatively with the Committee and with the U.S.
17 Trustee over the last couple of weeks, we have made some
18 changes to certain of the orders which we have provided --
19 revised orders and red lines reflecting those changes to
20 Your Honor in a binder. I'll just go in the order of the
21 agenda if that works for Your Honor.

22 THE COURT: Sure.

23 MS. ALEXANDER: First up is just the case
24 management motion. That was presented at the first day
25 hearing and we deferred. There have been no comments to

1 your objections on the case management motion.

2 THE COURT: I have some comments.

3 MS. ALEXANDER: Okay.

4 THE COURT: Your order refers to -- I guess the
5 procedures refer to a master service list and a 2002 service
6 list and to defined terms, but it doesn't say who maintains
7 them. I guess the Prime Clerk maintains the 2002 list but
8 who maintains the master service list? And if I'm making a
9 motion and I have to serve the master service list, how do I
10 know who I have to serve?

11 MS. ALEXANDER: Yes, Your Honor. I believe the
12 Prime Clerk would maintain that as well and post it on their
13 website, though I can confirm that that is the case.

14 THE COURT: Well, but it's not required under the
15 procedures.

16 MS. ALEXANDER: Okay. We can add that in if you
17 like, Your Honor.

18 THE COURT: All right.

19 MS. ALEXANDER: Yes.

20 THE COURT: It also looks like the procedures were
21 cut and pasted from your application. There's a lot of
22 phrases that "at their requests" in the procedures.

23 MS. ALEXANDER: Okay.

24 THE COURT: They don't belong in the procedures.
25 It should just say that this is the rule.

1 MS. ALEXANDER: Your Honor, we can modify that.

2 THE COURT: It's in there several times.

3 Paragraph 9, Section 342, Requirements, I didn't understand
4 this... Paragraph 9, I'm sorry, Section 342, Requirements.

5 MS. ALEXANDER: Your Honor, I can look back at
6 that. I don't have a copy of (indiscernible) at hand.

7 THE COURT: How do I predetermine (indiscernible)
8 apply to the provisions?

9 MS. ALEXANDER: I'm sorry, Your Honor?

10 THE COURT: How do I predetermine that you've
11 complied with the provisions in connection to the future
12 service?

13 MS. ALEXANDER: Sure, Your Honor. We can remove
14 this paragraph.

15 THE COURT: Okay. Paragraph 12, the Debtor
16 requests (indiscernible) times. Paragraph 16, this is the
17 evidentiary hearing provision. There are certain
18 proceedings under our local rules which require an
19 evidentiary hearing the first day.

20 MS. ALEXANDER: Okay.

21 THE COURT: Unless the Court (indiscernible)
22 otherwise. So, it should say, with respect to any Court
23 finding and an interlineate and subject to Local Bankruptcy
24 Rule 9014-2... And then the last phrase is -- unless --
25 instead of "unless the proposed hearing agenda provides

1 otherwise", it's "unless the Court orders otherwise."

2 MS. ALEXANDER: Thank you, Your Honor.

3 THE COURT: Let me understand Paragraph 23.

4 MS. ALEXANDER: Yeah, no, we can remove that.

5 THE COURT: All right. Oh, I skipped over a
6 couple of pages. I apologize. Paragraph 4, you talk about
7 service by electronic mail. If you exclude the summons and
8 complaint, there are also other pleadings that you can't
9 serve by electronic mail, for example, pleadings under
10 9014B, a subpoena. So why don't you just say unless the
11 Bankruptcy Code provides -- bankruptcy rules provide
12 otherwise, or I guess the Bankruptcy Code also you can serve
13 by electronic mail?

14 MS. ALEXANDER: (indiscernible)

15 THE COURT: We never -- we don't permit service by
16 filing an ECF. Never adopted a local rule which is required
17 for that. So you should take out Paragraph 5 since it's
18 unnecessary. And substitute "Nothing in this order
19 authorizes electronic service through the Court's CNECF
20 system."

21 MS. ALEXANDER: I'm sorry, Your Honor?

22 THE COURT: Nothing in this order authorizes
23 electronic service through the Court's CN/ECF system.

24 MS. ALEXANDER: Got it.

25 THE COURT: Paragraph 6, in the former papers you

1 should add that all pleadings have to be filed in a text-
2 searchable format. Exhibits can be scanned. And with those
3 changes I'll approve the case management procedures, unless
4 anybody wants to be heard in connection with the case
5 management procedures. The record should reflect there's no
6 response. Okay.

7 MS. ALEXANDER: Thank you, Your Honor. The next
8 order, Your Honor, is cash management. We submitted and I
9 had entered an interim cash management order that reflected
10 comments from the U.S. Trustee. The Committee has also
11 since provided comments on the order. And we have provided
12 a red line in the binder reflecting the changes from the
13 proposed final order to the current cash management order.

14 THE COURT: Does anyone want to be heard in
15 connection with the proposed final order? I've reviewed the
16 order and the changes and I will approve it. So you can
17 submit a final version.

18 MS. ALEXANDER: Thank you. Next up, Your Honor,
19 on the agenda is the wages motion. As Your Honor knows, we
20 filed the wages motion for the first day hearing and Your
21 Honor granted certain relief on an interim basis. We have
22 since consulted with the U.S. Trustee and the Committee
23 extensively on the relief sought in the wages motion that
24 was still open, specifically with respect to the sales
25 incentive program, the editorial incentive program, and the

1 severance that could arise if certain employees are not
2 hired by the buyer of the Debtor's company.

3 We've reached a resolution on all of those issues
4 for today. And I know our agenda said we would be putting
5 forth a final order. We're actually -- and what's in your
6 binder is a second interim order. That interim order
7 reflects approval after review by the U.S. Trustee and the
8 Committee of the sales incentive program and payments
9 thereunder, and the editorial incentive program and payments
10 thereunder.

11 We've provided to the Committee confidentially and
12 to the Trustee confidentially a list of all employees to be
13 paid the amounts discussed at length, their role at the
14 company, and ranks. And they are comfortable with their
15 relief in an ongoing... Both for now and on an ongoing
16 basis under those two programs, subject to the Committee's
17 cap of 25,000 on the editorial incentives and 340,000 total
18 on the -- on a quarterly basis on the sales incentives.

19 THE COURT: Does anyone want to be heard in
20 connection with the (indiscernible) order? Committee?

21 MR. QUSBA?: No, Your Honor, with those caps that
22 we negotiated we're okay with those aspects of the order.

23 THE COURT: When do you propose (indiscernible)
24 hearing?

25 MS. ALEXANDER: I'm sorry?

1 THE COURT: When do you propose to have the final
2 hearing or another (indiscernible)?

3 MS. ALEXANDER: Probably the July 26th hearing,
4 Your Honor. We wanted to give time for the Committee to
5 continue to evaluate. They're working hard, obviously, but
6 they just got access to a lot of the employment agreements
7 and (indiscernible).

8 THE COURT: I will adjourn that then to July 26th
9 at 10 o'clock.

10 MS. ALEXANDER: Okay.

11 MR. QUSBA?: Thank you, Your Honor.

12 THE COURT: Are you on the morning calendar or the
13 afternoon calendar on July 26th? It looks like the
14 morning...

15 MS. ALEXANDER: That's fine. Okay, the next
16 motion, Your Honor, on the agenda -- the next two motions
17 are the taxes motion and the insurance motion. Those were
18 both up -- as first days, Your Honor granted interim relief.
19 No substantive changes to the final relief sought for each
20 of those, and no informal or formal objections received on
21 either.

22 THE COURT: Does anyone want to be heard in
23 connection with those orders? The record should reflect
24 there's no response. They're approved. You can submit a
25 final order.

1 MS. ALEXANDER: The utilities motion is before
2 Your Honor for the first time today. We filed that as a
3 first day but it was delayed. And that's a fairly standard
4 motion. We've also received --

5 THE COURT: It's not so standard.

6 MS. ALEXANDER: Not so standard...

7 THE COURT: I mean, the order's not so standard.
8 The motion is standard.

9 MS. ALEXANDER: Okay.

10 THE COURT: Does anyone want to be heard in
11 connection with the utilities motion? The issue I have with
12 the utilities motion...if you're supposed to order the
13 adequate assurance, they don't have to ask for it. And
14 you're not offering any adequate assurance.

15 MS. ALEXANDER: Your Honor, yes, I understand.
16 Instead of sending out deposits to the utilities we are
17 saying that we will provide deposits at the utilities'
18 request then. I know that --

19 THE COURT: That doesn't sound like adequate
20 assurance to me.

21 MS. ALEXANDER: Your Honor, I know that the
22 utilities can request further adequate assurance if they
23 need it. To the extent that Your Honor wants us to send out
24 deposits...

25 THE COURT: Why don't you do the usual two weeks

1 deposits and then if they think they want more, they're
2 entitled to come back under the procedures.

3 MS. ALEXANDER: Okay, Your Honor.

4 THE COURT: If they're already holding two-week
5 deposits and there's no prepetition loophole, that's fine
6 also.

7 MS. ALEXANDER: Okay. Your Honor, if it's
8 acceptable to you, I'll just skip over the DIP motion for
9 the moment.

10 THE COURT: Okay.

11 MS. ALEXANDER: My colleague Mr. Galardi is going
12 to come back up. And move on to the next motion on the
13 agenda which is the critical vendor's motion. That motion,
14 Your Honor, was also filed as a first day. We delayed and
15 didn't do an interim order after consulting with the company
16 and realizing we would be okay to come to this hearing. But
17 it is up for today. We submitted, as Your Honor knows,
18 confidential information to you -- to your chambers as well
19 as to the Committee and to the U.S. Trustee, both of whom
20 have evaluated the potential vendors to be paid and amounts
21 to be paid and basis therefore. And I understand the
22 Committee has no objection and the U.S. Trustee has no
23 objection.

24 THE COURT: Let me hear from the Committee.

25 MR. QUSBA: Good afternoon, Your Honor. Sandy

1 Qusba, Simpson Thacher & Bartlett, proposed counsel for the
2 Creditor's Committee. We have spent some amount of time
3 with respect to the critical vendors' motion; in fact, with
4 Deloitte as well, our proposed financial advisor. Given the
5 caps and given the vendors' diligence that we did, we're
6 comfortable with respect to the request, and obviously are
7 very focused on maintaining the enterprise as we bridge to a
8 sale.

9 THE COURT: All right.

10 MS. ALEXANDER: I should add here, Your Honor. I
11 notice that the binder that we provided you with had the
12 final order as originally filed. The Committee has asked
13 for and we will submit to you a notation in that order that
14 will reflect that payments to critical vendors will only be
15 made upon consultation with the Committee.

16 THE COURT: Okay, all right. Anyone else want to
17 be heard with respect to the critical vendor order? With
18 those changes I'll approve the critical vendor order.

19 MS. ALEXANDER: Okay, the next motion before Your
20 Honor is the interim compensation motion to establish
21 procedures for interim compensation.

22 THE COURT: Does the proposed order deviate from
23 our guidelines at all?

24 MS. ALEXANDER: No, I believe the proposed order
25 follows the general order.

1 THE COURT: Anybody want to be heard with respect
2 to the interim compensation order? Hearing no response and
3 based on your representation, I'll approve it.

4 MS. ALEXANDER: The next motion before Your Honor
5 is for retention -- the ability to retain ordinary course
6 professionals. We've provided a list of those ordinary
7 course professionals as Exhibit E.

8 THE COURT: Well, some of these ordinary course
9 professionals are just listed at litigation services. Are
10 they representing the Debtor in discreet litigations?

11 MS. ALEXANDER: They would be representing the
12 Debtor in discreet litigations. For most of them the
13 litigation is obviously stayed for all of them at this
14 point. We've put them--

15 THE COURT: Why aren't they retained on the 327E?
16 That's what 327E is for.

17 MS. ALEXANDER: I'm sorry, Your Honor, maybe I
18 misunderstood your question.

19 THE COURT: Why aren't they retained under 327E?
20 This procedure for retention of ordinary course
21 professionals, which isn't even a bankruptcy code, is really
22 for when you have to pick up the phone and call somebody
23 because you have a labor issue or a landlord-tenant issue or
24 something like that. But if the law firm is representing
25 the Debtor in a litigation, that's what 327E is designed to

1 deal with.

2 MS. ALEXANDER: Your Honor, I think three of the
3 firms are listed as potential litigation representatives.
4 We can certainly do 327E applications for them, if you like.
5 These are--

6 THE COURT: It's (indiscernible) what I like.

7 MS. ALEXANDER: I understand, Your Honor.

8 THE COURT: I'm telling you that this is not a
9 procedure to retain counsel that represents the Debtor
10 prepetition in a discreet matter and continues to represent
11 the Debtor post-petition. That's why 327 (indiscernible) on
12 the Bankruptcy Code.

13 MS. ALEXANDER: Okay, Your Honor. We can take
14 those few out. And I will confirm before that--

15 THE COURT: As far as the litigation -- as far as
16 the corporate counsel is concerned, I understand that. If
17 there's a problem with paying them...and I assume you're
18 just picking up the phone and asking them a lot of questions
19 at this point.

20 MR. GALARDI: Your Honor, may I just address it
21 for one second?

22 THE COURT: Sure.

23 MR. GALARDI: I agree with Your Honor that
24 ordinary course is usually the 327E person. Again, why, at
25 least in some courts -- and Your Honor may have a different

1 practice. Sometimes you do the 327E only because of the
2 expense of filing four or five other applications and having
3 them do fee applications. I just --

4 THE COURT: I understand it's a practical problem
5 -- issue but, you know, the code is the code. And if we
6 started ignoring the requirements of the code when it was
7 impractical, this would be a free for all.

8 MR. GALARDI: I understand. Even the ordinary
9 course 327A is really not in the code either, Your Honor.

10 THE COURT: But we overlook that because it's
11 small amounts, and to require somebody who is doing a few
12 hundred dollars' worth of work a month, it just -- it
13 doesn't make sense. But...

14 MR. GALARDI: And these are people of a... And,
15 again, Your Honor, I'm not trying to --

16 THE COURT: They're stayed litigations. They're
17 not going to have that much to do. Or at least they're
18 currently stayed.

19 MR. GALARDI: Correct, Your Honor.

20 MS. ALEXANDER: Your Honor, and so -- again, we're
21 happy to go ahead and file the applications for them. A
22 couple of these I understand to be very small matters.

23 THE COURT: One other change. If you're going to
24 add anybody...

25 MS. ALEXANDER: Yes.

1 THE COURT: ...it has to be pursuant to court
2 orders. And the reason for that requirement is that --
3 every judge in this court has a certain law firm or law
4 firms they can't authorize the retention of. Myself
5 included. I couldn't authorize the retention of at least
6 one law firm where my son works, even though he has nothing
7 to do with the case under an order like this. So I'd have
8 to get somebody separate, somebody else to sign that order.

9 So, any additions have to be so ordered by the
10 Court. And you can submit it with a Certificate of No
11 Objection if you can work out the procedure.

12 MS. ALEXANDER: Thank you, Your Honor. We will
13 make those changes.

14 THE COURT: Otherwise (indiscernible).

15 MS. ALEXANDER: The remaining matters before Your
16 Honor, before Mr. Galardi returns to the podium, are the
17 retention of Prime Clerk both as noticing agent and as
18 restructuring advisor -- sorry, excuse me -- administrator
19 advisor.

20 THE COURT: Okay.

21 MS. ALEXANDER: And we did not receive any
22 objections (indiscernible) to those.

23 THE COURT: Has the Clerk of the Court approved
24 the noticing agent order?

25 MS. ALEXANDER: I believe so, Your Honor. I will

1 confirm that the Clerk of the Court has. I believe that
2 they did.

3 THE COURT: (indiscernible) sign off on it.

4 MS. ALEXANDER: Okay, will do.

5 THE COURT: (indiscernible) the clerk -- on the
6 156C, Prime Clerk was doing the clerk's job. With respect
7 to these retention orders -- it's a generic comment -- there
8 are all sorts of (indiscernible) indemnification rights
9 under these orders, and there are certain exceptions
10 generally for willful misconduct, gross negligence, breach
11 of fiduciary duty and the lot.

12 A lot of these orders or more often the retention
13 letters say that we're not entitled to indemnity for any
14 reason; we're still entitled to contribution, we're entitled
15 to limitations on liability in certain circumstances. But
16 if somebody's committed an act that doesn't entitle to
17 indemnity, they're not going to get any limitation
18 liability, any contribution, any exoneration. So you should
19 add that to the standard clause which is your order.

20 MS. ALEXANDER: Yes.

21 THE COURT: I mean, I haven't seen it, obviously.
22 Some of them -- some of these retention provisions provide
23 for arbitration or something like that if there's a dispute
24 under the order. Any disputes are resolved here.

25 MS. ALEXANDER: Thank you, Your Honor. Will do.

1 THE COURT: Okay. It's a comment in all of these
2 orders, including the professional retention orders. It's
3 obviously not in the lawyers' orders but it's in the
4 financial advisors' orders -- so it's up in accountants'
5 orders also.

6 MS. ALEXANDER: Okay, we will make that edit, Your
7 Honor, in all of the retention applications order --

8 THE COURT: Right.

9 MS. ALEXANDER: And then, of course, the order
10 saying that the order governs -- with respect to --

11 THE COURT: It usually says notwithstanding
12 anything in the retention order or anything else, this is
13 the rule.

14 MS. ALEXANDER: The last retention application I
15 would present to Your Honor then is more Opportune and of
16 course taking into account those same comments you made to
17 ensure that the order reflects limitations on indemnity and
18 notes that the order governs to the extent it conflicts with
19 the engagement letter. And then I would cede the podium
20 over to my colleague.

21 THE COURT: Okay. So you're proposing the two
22 Prime Clerk orders. Does anyone want to be heard in
23 connection with either of those orders?

24 MR. ZIPES: Your Honor, can I just have one
25 moment, please?

1 THE COURT: Sure.

2 MR. ZIPES: Subject to the clerk's approval with
3 the 156C order, that's approved. And the retention as
4 administrative agent is approved. With the changes. And
5 what are we up to now?

6 MS. ALEXANDER: The last one I will present to
7 Your Honor is Opportune.

8 THE COURT: What number is that?

9 MS. ALEXANDER: It is under C, Professional
10 Retentions, Number 3 on Page 5 of the agenda.

11 THE COURT: I'm looking in your books here.

12 MS. ALEXANDER: Oh, 13 in the book of orders.
13 And, Your Honor...

14 THE COURT: Does anyone want to be heard in
15 connection with the application to retain Opportune?

16 MS. ALEXANDER: Mr. Zipes just correctly pointed
17 out to me that Opportune has agreed -- in the order it had
18 said -- and you can (indiscernible)... At the end of
19 Paragraph 5, it had said that Opportune was not required to
20 maintain time records. As Mr. Zipes correctly pointed out,
21 they have agreed to maintain time records on a daily basis,
22 and we will make that correction in the order to reflect
23 that they will keep time on a daily basis rather than a
24 point five-hour basis.

25 THE COURT: All right, this one has a limitation

1 of liability to six months of plead. So there's still \$10
2 million, but you've only paid them \$1 million. The limit of
3 their liability is \$1 million over this...

4 MS. ALEXANDER: Yes, Your Honor, as Mr. Galardi
5 said, we will modify all of those provisions.

6 THE COURT: All these modified orders that you're
7 sending me, send me a redline copy and a (indiscernible)
8 copy, all right?

9 MS. ALEXANDER: Yes.

10 THE COURT: All right, that one is approved.

11 MS. ALEXANDER: Your Honor, I have no further
12 questions on these orders. I'll cede the podium back to Mr.
13 Galardi.

14 THE COURT: Okay.

15 MS. ALEXANDER: Thank you.

16 MR. GALARDI: Your Honor, perhaps given your
17 comments, it's best to finish with the retention
18 applications first and then go back to the DIP in the sale.
19 The first one that I would be handling is the Ropes & Gray
20 retention. Fortunately or unfortunately, lawyers don't get
21 indemnification. We don't get success fees...

22 THE COURT: I know that. I'm still waiting for
23 (indiscernible).

24 MR. GALARDI: So, I don't think we have any of the
25 same issues. We've received no comments. I did, in fact,

1 file a supplemental affidavit last night. We don't believe
2 we have any conflicts. We have discussed with the U.S.
3 Trustee -- I don't believe there are any comments to the
4 retention. So unless Your Honor has some questions about
5 our retention, we'd ask that you approve Ropes & Gray's
6 counsel (indiscernible).

7 THE COURT: Does anyone want to be heard in
8 connection with the application to approve Ropes & Gray's
9 retention? The record should reflect there's no response.
10 The application is granted.

11 MR. GALARDI: Thank you, Your Honor. Then the
12 final retention application that is up for today -- and
13 there is a representative, Reed Snellenberger, who's in the
14 courtroom today, who put forth the declaration and support -
15 - is the retention application of Houlihan Lokey.

16 Your Honor, just to go over some of the fees, is
17 that it's a \$150,000 a month fee. There is a credit after
18 six months of -- six months at 50 percent. There is a DIP
19 financing fee, which was the greater of \$1 million or a
20 percentage. As a result of the conduct and the approval of
21 the DIP, at least on an interim basis, they would have
22 earned already a million-dollar fee on that.

23 There is also a transaction fee set forth in the
24 transaction. Just to give Your Honor an idea of what the
25 transaction fee would be -- given the current \$90 million

1 offer, there was a minimum transaction fee in the agreement
2 of \$1.25 million. And based upon the extra 40 over 50,
3 because the offer is a \$90 million offer, they're entitled
4 to approximately another \$800,000. So about a 2 -- a little
5 over a \$2 million fee.

6 So, they do have what I will call the typical
7 investment banker...

8 THE COURT: Typically, there's a credit, though,
9 against the monthly fees.

10 MR. GALARDI: Right. But the credit in this
11 instance was the very first thing. There's not a credit for
12 the first three months; there's not even a credit for the
13 first six months. So, if I were to total up the fees, let's
14 say, as of August, they would've had a June, a July, an
15 August, that's three -- about 450, maybe six if there was a
16 partial month. Six plus a million DIP fee, plus, roughly, 2
17 million.

18 So, the way we figure, by August, given the
19 activities they've done, by the 1st of September, they will
20 have earned about a \$3.75 million fee for their activity in
21 this case.

22 They do have the typical investment banker
23 indemnification. We will make clear the order about all the
24 provisions that Your Honor had said with respect to -- as
25 I'm used to putting in in the order that says the order

1 governs with respect to indemnification provisions and all
2 of those things.

3 We have obviously circulated this to the U.S.
4 Trustee's Office, to the Creditors Committee. We have
5 received no objection, and we would ask Your Honor to enter
6 the retention application for Houlihan Lokey.

7 THE COURT: Does anyone want to be heard in
8 connection with the retention of Houlihan Lokey? By the
9 way, the provision that I was mentioning, you've already got
10 part of it in 11B of this particular order. Just they're
11 not entitled to a limitation on liability, contribution, or
12 exoneration if they do any of the things that are listed in
13 this order. All right. Otherwise the order is approved.

14 MR. GALARDI: Thank you, Your Honor.

15 THE COURT: The motion is approved.

16 MR. GALARDI: Your Honor, now I would turn back to
17 a motion that was skipped over, which was the DIP motion and
18 final order with respect to the DIP motion. As I had
19 mentioned earlier in my introduction, we had filed a debtor
20 in possession financing motion as of the first day. That
21 motion sought interim relief of approximately \$17 million,
22 which would've paid off a first lien facility by Silicon
23 Valley Bank and then consensually primed -- I called it
24 Columbus Nova. There is another name for that -- the actual
25 owner of it. But a consensual prime.

1 Today we seek to go on a final basis consistent
2 with the provisions that we have a final order entered
3 within the time period set forth in the credit agreement and
4 for approval of \$22 million on a final basis. Your Honor,
5 we have gone through with the Committee and, frankly, there
6 were only a few comments. And I can certainly walk through
7 Your Honor with respect to the form of order. We did file a
8 blackline of that order.

9 And probably the best way to work through it --
10 the comments -- most of the comments are simply to reflect
11 that fact that there's a final order. That there is a
12 committee that's been appointed. There are a number of
13 strikethroughs, for example, in the findings to reflect that
14 it's now a final order as opposed to an immediate entry of
15 an order.

16 There is, I think, one provision that has
17 increased the carve out from 500 to \$650,000. That was one
18 of the changes that the Committee had requested. The 506C
19 waiver is now final, Your Honor, under this order.

20 There was a provision, which I think is new
21 entirely in this order, that has been kept in it and it is
22 the waiver of an obligation against any non-debtor obligors
23 on the prepetition debt. I believe it's in Paragraph 18D of
24 this particular order. That was requested. It was not our
25 intention to have actually released a non-debtor guarantor

1 of the debt, but nonetheless, the Committee did, in fact,
2 ask for that provision to be put in. You will see it at the
3 very end, I believe, of -- on Page 49 of the blackline under
4 D.

5 THE COURT: What's the reason for that?

6 MR. GALARDI: I led the Committee... I am going
7 to speculate that I believe Mr. Denton --

8 THE COURT: (indiscernible) speculation
9 (indiscernible)...

10 MR. GALARDI: I think the bottom line is that
11 there is a non-debtor such as Mr. Denton that may have
12 guaranteed certain of this debt, and they just wanted to
13 make it clear that Mr. Denton did not get released --

14 THE COURT: Oh, this is a non (indiscernible)?

15 MR. GALARDI: That's what it is. It's a non
16 (indiscernible)...

17 THE COURT: I thought it said the other
18 (indiscernible)...

19 MR. GALARDI: Oh, no, I'm sorry. No, it is a
20 clarity to not release a third party.

21 THE COURT: Now I understand.

22 MR. GALARDI: Okay. And, again, it was never our
23 intention to do so. Your Honor, I think there's other
24 clarifications about the timing of payments from the asset
25 sale that would actually go to pay off the debt. We have

1 been advised and Cerberus had asked for, and I was going to
2 put this on the record, that Cerberus asked to be a notice
3 party pursuant to the bid procedures. They've advised me
4 that they will not be bidding in this transaction. So we
5 had no objection to that. That also makes sure that they
6 can come in and first lien lenders want to see that if the
7 sale has gone through and the price is above their debt,
8 then they can no longer -- they are getting paid off, and we
9 had no objections to that. There is clarification on that.

10 I don't believe that there was -- and the
11 Committee can correct me -- any other, other than
12 clarifications of language, more or less clarifications of
13 language with respect to the DIP order provisions that you
14 wanted me to highlight.

15 MR. QUSBA: Your Honor, Sandy Qusba, Simpson
16 Thatcher & Bartlett, again, proposed counsel for the
17 Creditors Committee. We recognize obviously this is a new
18 money financing. This is not an incumbent prepetition
19 lender searching for ways to improve their position; this is
20 truly new capital coming in. Accordingly, we reviewed the
21 DIP order and the DIP financing in that context.

22 Nevertheless, we did negotiate a number of other
23 things, including confirming that the DIP financing and the
24 adequate protection liens would not reach to and encumber
25 avoidance actions, which certainly could be an opportunity

1 for us to augment the size of this estate.

2 The Committee is also not bound by the equities of
3 the case exception 552. The investigation period was
4 extended by another couple of weeks, 15 days. The same with
5 the investigation budget as well from 35,000 to 75,000. Mr.
6 Galardi already referenced the increase in the carve out as
7 well. And we will have consultation rights with respect to
8 any new budgets and certainly will be involved in that
9 aspect of it as well.

10 But, again, we view this as a short-term DIP
11 financing in order to bridge us to a sale transaction. And
12 we expect Mr. Harris and his clients to be gone in short
13 order. Obviously, we are retaining rights with respect to
14 our investigation of prepetition debt and exposure, and to
15 be able to disgorge that if there's a problem, subject to
16 Your Honor granting the appropriate orders and the like.

17 THE COURT: Thank you.

18 MR. QUSBA: Thank you, Your Honor.

19 THE COURT: Does anyone else want to be heard with
20 respect to the financing order? I'll approve the financing
21 order based upon the record that was made at the time the
22 interim order was filed, and the additional information
23 provided by the Committee. There's nothing remarkable
24 really about the order. It's a fairly standard order that
25 we see in these cases.

1 I guess the issue I had raised the first time is
2 the rollup, and you tell me that that is to avoid priming
3 problems.

4 MR. GALARDI: With respect to (indiscernible) you
5 raised the issue as to why we were catch collateralizing VLC
6 and I explained that that was (indiscernible). Correct.
7 And Mr. Holden is in the courtroom and obviously would
8 affirm his statements in the declaration and the use of the
9 proceeds to the extent Your Honor needed any evidence
10 further with respect to its need.

11 THE COURT: By the way, when I ask for blackline
12 copies, when you send them it's blacklined off of the most
13 current copy that you're giving me. Because I've reviewed
14 the changes already up until today.

15 MR. GALARDI: Correct, Your Honor. Anything
16 subsequently will be after when we file.

17 THE COURT: Which brings us to the sale motion.

18 MR. GALARDI: Which brings us to the bid
19 procedures and sale motion, yes, Your Honor. Again, as a
20 result of the efforts, cooperative efforts of the Committee
21 as well as Ziff-Davis and the Debtors, Your Honor, we have
22 resolved both the Committee's objections or informal
23 objections as well as the one objection you may recall that
24 Mr. Belaya's counsel had filed an objection early on with
25 respect to the proceeds of avoidance actions or third party

1 actions and intercompany actions.

2 So, though they span four documents, all of the
3 objections have been resolved. What I'd like to do, Your
4 Honor, is to walk through the changes to the bid procedures
5 order since I think they generate -- they are the most
6 significant of the changes, although most of it is dates.

7 As we had always anticipated and now it's
8 explicit, we have agreed to consultation rights, and many of
9 the changes are consultation rights with respect to the
10 procedures, with respect to the auction, with respect to the
11 sale, with respect to sharing of information from potential
12 bidders. That -- those are changes that we have put
13 throughout.

14 I think, and as I've highlighted in the
15 introduction, one of the most significant changes is on Page
16 3, is the extension of the bid deadline, which had been
17 originally scheduled for July 27th or originally proposed
18 for July 27th, is now August 5th.

19 Your Honor, in that regard, there used to be a
20 concept of a preliminary bid and a preliminary bid deadline.
21 We've deleted the preliminary bid deadline because it just
22 another thing the bidders would have to jump through a hoop.
23 And we agreed in talking with the committee to do that. And
24 Mr. Torken on behalf of the buyer agreed similarly.

25 Your Honor, the next change is a clarification --

1 and I think this just makes the math much easier -- that the
2 bid requirements include simply a flat \$9 million deposit.
3 And that's based on 10 percent. So, if somebody puts in a
4 little bit bigger bid, we're only going to start with the \$9
5 million. That just made us not have to do math and actually
6 created a little bit less of a threshold so that people
7 could go up higher and put less of a deposit in.

8 We've made clear that we're not going to -- and
9 this was in the motion, and the Committee asked us -- I'm
10 now on Page 4 of the blackline, last paragraph, Paragraph C.

11 THE COURT: You're looking at the bid procedures
12 now?

13 MR. GALARDI: I am looking at the bid procedures
14 themselves; not the order. I apologize. They're probably
15 blacklined too.

16 THE COURT: I'm looking at the blacklined.

17 MR. GALARDI: Okay. It's Page 4 of the bid
18 procedures. There's bid requirements. I did speak to the
19 B, which is the \$9,000 deposit. I'm now in C. Again, there
20 are clarifications of the amount and what the purchase price
21 will be, and it's a \$90 million purchase price.

22 But you will see there is a provided further
23 paragraph at the end, and it is to make clear what we had
24 said in the motion -- that when we determine the highest or
25 otherwise best bid, we're not going to be attributing value

1 to the consulting agreement with Mr. Denton or other
2 agreements that Mr. Denton may enter into.

3 Obviously, and as I said to the Committee, we
4 agree to that, but should somebody take on an indemnity
5 obligation, and we may be back here on that. But other than
6 that, we are making it clear that that -- his getting a
7 separate compensation is not value the company receives.

8 THE COURT: Along that line, do you think that
9 this transaction is subject to the business judgment rule or
10 some other rule since Mr. Denton has signed the agreement
11 and he has a \$400,000 consultant fee -- consulting
12 agreement?

13 MR. GALARDI: Well, there's two ways we've
14 addressed that, Your Honor. First, we did hire an
15 independent board member prior to it to make sure we had an
16 independent board member to whom these activities are, in
17 fact, granted. Second is --

18 THE COURT: So, did the -- who approved this
19 transaction?

20 MR. GALARDI: Excuse me?

21 THE COURT: Who approved this APN?

22 MR. GALARDI: The independent board member. The
23 board is full. So, you have, again, corporate governance
24 issues with respect to whether that's an interested or
25 entitled to the business judgment. You do have an

1 independent director with no financial stake who did, in
2 fact, approve it.

3 THE COURT: But Mr. Denton signed the agreement.

4 MR. GALARDI: Yes, he did sign the agreement. But
5 signing the agreement doesn't mean it's an authorized
6 signatory, right? It still needs board approval. So you
7 have all of the wrinkles of whether a single disinterested
8 board member who approves it would be entitled to business
9 judgment, or you have an interested board member who does --

10 THE COURT: So, who approved it?

11 MR. GALARDI: The board of directors approved it
12 in full with the independent board members separately
13 approving the signing of the asset purchase agreement.

14 THE COURT: Okay. Who on the board -- who are the
15 board members? Isn't Mr. Denton a board member?

16 MR. GALARDI: Mr. Denton is a board member, Ms.
17 Dietrich is a board member, Mr. Tilman is a board member,
18 and Thomas...Plunkett is a board member.

19 THE COURT: So I assume that Mr. Denton didn't
20 vote on it.

21 MR. GALARDI: I don't remember the board minutes.
22 I think he may have abstained from that, Your Honor.

23 THE COURT: (indiscernible) abstained?

24 MR. GALARDI: Your Honor, I don't have the board
25 minutes. But I think... First of all, I don't believe it's

1 necessary for him to have abstained.

2 THE COURT: Really?

3 MR. GALARDI: Yes. That just changes the standard
4 (indiscernible).

5 THE COURT: Right. So --

6 MR. GALARDI: So, I'm starting back with your
7 question of business judgment --

8 THE COURT: That's why I raise the question.
9 Because your application says it satisfies the business
10 judgment rule. I'm not sure that's the appropriate
11 standard.

12 MR. GALARDI: Well, again, Your Honor, I believe -
13 - again, we'll get into the nuances of Delaware corporate
14 law. One is I don't recall specifically whether Mr. Denton
15 voted on this one or we asked him to abstain from this.
16 Second is it did have the independent board member approve
17 it. Obviously, before finally going through it, it will be
18 the independent board member that prosecutes that motion.
19 Whether it's --

20 THE COURT: But the mere approval of the bid
21 procedure subjects the Debtor to a lot of potential
22 liability under the APA, right?

23 MR. GALARDI: Excuse me? Yes, it did subject by -
24 - and again --

25 THE COURT: So, today's the day. If I approve

1 this -- if I sign the bid procedures order, you're locked in
2 to the liquidated damages and everything else, right?

3 MR. GALARDI: Correct, Your Honor. And with
4 respect to those procedures -- and, again, those are part of
5 the changes that were made -- with respect to those
6 procedures, one, business judgment we still think applies
7 because the independent director approved all of these
8 provisions and we asked them to separately approve this.
9 So, that's one.

10 Two, even if Your Honor -- and, again, when we
11 talk business judgment standard in Delaware, and we talk
12 business judgment in corporate fiduciary law, and we talk
13 business judgment in the Bankruptcy Court, they're never
14 quite the same. And I think the cases say that.

15 THE COURT: Well, I know bankruptcy is very
16 different.

17 MR. GALARDI: It is very different. And it's a
18 higher standard. And so we believe under the business
19 judgment standard, as used in the 363 sale context, we still
20 satisfy that.

21 But even if Your Honor thought it was a higher
22 fairness independent judgment standard, we still think it
23 satisfies those standards. Again, it was exactly those
24 concerns that the Committee raised with respect to
25 liquidated damages, which we'll walk through -- is a change

1 to the order that we believe was appropriate. We think it's
2 an exceptionally rare circumstance. And as you will see,
3 it's drafted, and even more exceptionally rare that we would
4 be subjected to that liability. So the board, and including
5 Mr. Tilman, were quite comfortable with that provision.

6 So, and the other liability, again, is the breakup
7 fee liability. And that we think has been well-earned.
8 It's a no diligence, no financing out agreement. So with
9 all of those things all presented to the board -- thought
10 that it was an exercise of business judgment within the
11 standard of the Bankruptcy Code.

12 THE COURT: Do you think it's an appropriate
13 exercise of business judgment to pay both the breakup fee
14 and the (indiscernible) damages for the same loan? Just
15 asking.

16 MR. GALARDI: No, I understand and I'm thinking
17 through this particular agreement. And I see a little smile
18 on your face. Do I think it's justified? Again, I'm going
19 to answer this in the way a lawyer will answer this
20 (indiscernible) have a sale.

21 No, I'm going to say, Your Honor, this was the
22 best deal that we could get. The liquidated damages clause,
23 though I understand it's a concern, it's that we would have
24 to dismiss this case. And that's when it's payable. And
25 there would never be an intention to do that unless there

1 was... So I think making that decision --

2 THE COURT: No, no, no, liquidated damages --
3 somebody makes a motion to dismiss and you don't use
4 commercially reasonable efforts to oppose it, right?

5 MR. GALARDI: Again, I don't think there's... And
6 I think it's been modified in this particular version,
7 anyway, Your Honor, with respect to we have to be the party
8 to make it. I think that was the change.

9 THE COURT: No, I think it's -- that opposition --

10 MR. GALARDI: Commercial? I would have to use
11 still commercially reasonable...

12 MAN 1: There are two or three event --

13 THE COURT: Even if it's dismissed, they earn the
14 breakup fee also, right?

15 MR. GALARDI: Yes.

16 THE COURT: Yes. So they get...

17 MR. GALARDI: They get a lot of money.

18 THE COURT: They get \$17 million if the case is
19 dismissed.

20 MR. GALARDI: Correct, Your Honor. And, again,
21 when you view the risk of that dismissal, and you view the
22 risk of what we have to do to oppose that, I think that is a
23 very limited risk in exchange for which we have now gotten
24 one security with respect to a sale that has no financing
25 and no due diligence out. It's a standard stalking horse

1 provision that sets a floor of \$90 million in a troubled
2 company that was subject to litigation.

3 So, again, if Your Honor uses independent
4 judgment, as it would in a court case if this was an
5 interested transaction, I think it's justified. And I think
6 on the business judgment and based upon the discussions with
7 the independent board member, the independent board member
8 felt comfortable that that was a risk, given the
9 circumstance that was appropriate for the business.

10 With respect to -- well, do you want to continue
11 or shall I go through more changes?

12 THE COURT: No, go through it.

13 MR. GALARDI: Sure. Your Honor, with respect to
14 the other provisions, you will see that there is a deletion.
15 Again, the Committee pursued deletions on Paragraphs F and
16 G, which make the ability for a new bidder to come in and
17 give us flexibility to choose a higher and better -- those
18 two provisions were stricken, so they are no longer stuck to
19 what the provisions are in the various stalking horse APA.

20 You will see there are other consultation rights.
21 We have to consult with the Committee about a qualified
22 bidder. Then you will see the next big change is on Page 7,
23 which is the auction, which has now been set -- this order
24 provided August 17th. We've now agreed with the Committee
25 and Mr. Torken on behalf of Ziff-Davis that it'll actually

1 be a day earlier, which will be August 16th, without
2 changing the bid deadline.

3 That will give us two things: One is there were
4 certain people that were unavailable on the 17th; but I
5 think, more importantly, should we have a robust auction, it
6 gives us a day and it also gives us a day to prepare for the
7 sale hearing so that we've added that -- we've brought back
8 that day, but it does not change the timing or the ability
9 to solicit bids, which has been extended.

10 We added a section on Page 8 with respect to the
11 Committee's advisors having a right to observe all private
12 discussions in meetings between the Debtors and qualified
13 bidder. We accepted that from the Committee. That was in
14 addition to the consultation rights.

15 You will see on Page 9, its addition of
16 consultation rights, and we did add a paragraph -- although
17 we did not get the stalking horse -- the currently stalking
18 horse bidder to agree to this, you will see on Page 9 that
19 there is a period of time that backup bidders must stay
20 ready to close for the consummation of the successful bid or
21 20 days after the sale hearing.

22 And, Your Honor, the idea was to make it as short
23 as possible but ensure a closing. And if we were worried
24 about it, then to be able to close and not lose a bidder or
25 not have to make any big sale. That was also included on

1 Page 10, where we have the provision that the deposit would
2 have to be returned in that same sort of time period. And
3 then there was all reservations of rights with respect to
4 the deadlines and consultation of the Committee.

5 Those were the changes to the bid procedures
6 themselves, Your Honor. I can walk through the changes to
7 the bid procedures order. Most of those are related. And I
8 think this is the most significant change, Your Honor, and
9 you can see it in the title.

10 What the original agreement required us to do was
11 to actually assume the contract pursuant to 365 today. That
12 is no longer the case but we are, as the company is taking
13 on, and this was at the request of the Committee -- we are
14 obligated to perform certain pre-closing obligations. And
15 that order has been revised so as to not assume the
16 agreement, but to actually direct and enforce certain of the
17 provisions of the asset purchase agreement.

18 That's why we will have an amendment to the asset
19 purchase agreement. But you will see the changes in the
20 actual order approving bid procedures reflect that in many
21 of the provisions and the changes. The deadlines that I've
22 already mentioned are changed on Page 6 and 7 of the
23 blackline.

24 And because we did change the obligation -- the
25 agreement from an assumption of the asset purchase

1 agreement, you will see the changes in Paragraphs 10, 11,
2 and 12 lay out. Specifically, the provisions in 10 are laid
3 out as to what we will have to comply with. The paragraphs
4 of 11 address the damages and what will be the status of the
5 claims in the event that we, in fact, reach the agreement --
6 with no intentional breaches.

7 And then Paragraph 12 sets out the level of the
8 expense -- administrative expenses under 503B and 507 --

9 THE COURT: What authority granted super-priority
10 to Ziff-Davis?

11 MR. GALARDI: Excuse me? What's the authority for
12 granting a super-priority --

13 THE COURT: Yeah, the statutory authority.

14 MR. GALARDI: Your Honor, I believe that if
15 they... Again, my --

16 THE COURT: They're not lending money so they
17 don't get a super-priority under 364, and they're not
18 talking about a shortfall of the cash collateral, so they're
19 not getting -- or super-priority under 507B. What's...?

20 MR. GALARDI: Your Honor, I believe that the Court
21 has the authority to grant administrative expenses or even
22 prior expenses --

23 THE COURT: Under Section 105A, I assume?

24 MR. GALARDI: Yes, Your Honor. Under Section
25 105A. And, again --

1 THE COURT: I disagree, by the way, but go ahead.

2 MR. GALARDI: Well, again, Your Honor, that is the
3 authority that I believe that you can grant and elevate
4 certain expenses so that they get paid ahead of
5 administrative creditors.

6 THE COURT: Another question I have. Under
7 Paragraph 25...

8 MR. GALARDI: Okay.

9 THE COURT: ...the Debtor's (indiscernible)
10 disagreement without further order of the Court. So why am
11 I even approving it?

12 MR. GALARDI: That's the amendment, Your Honor.
13 It's not this order. And it's the amendment with respect to
14 that --

15 THE COURT: That's just limited to the amendment?

16 MR. GALARDI: Yes. The 25 that I have in the
17 blackline says, "The Debtors are authorized and directed to
18 enter in to the amendment to the stalking horse agreement."

19 THE COURT: Okay.

20 MR. GALARDI: Attached is Exhibit 4. And to take
21 all actions necessary. Now, am I not reading the same
22 paragraph?

23 THE COURT: No, I'm sorry. I misread it. Because
24 I have seen them where they say you can just change it.

25 MR. GALARDI: Your Honor, I've seen them. I've

1 never put one in but somebody may show me an order before...
2 No, so, Your Honor, let's now turn to the actual amendment,
3 Your Honor, which did address the liquidated damages
4 clauses. This is obviously all new because it is an
5 amendment to the agreement.

6 THE COURT: Right.

7 MR. GALARDI: I have it at Docket 77, which, at
8 least my pages started at 143 to 154. You will see that the
9 amendment makes clear certain excluded assets from the
10 purchase agreement, which is the amendment to -- which is
11 the very first page.

12 Next, Section 2.1H of the asset purchase agreement
13 is also amended. So, except for the excluded claims, the
14 litigation of the closing claims guarantees insurance. That
15 is now included in the language. Again, this was Committee
16 recommendations.

17 The -- 210 is now amended to make sure on the
18 allocation. As Your Honor knows, I think, from the
19 beginning and what I've mentioned to the Committee, one of
20 the issues will be, and one of the issues which we have
21 determined to wait until the sale proceeds is how will the
22 proceeds among the three Debtors be allocated?

23 As the Committee is well-aware and as I mentioned
24 at the beginning, the creditors that they represent,
25 although they represent all creditors -- the creditors that

1 happen to be on the Committee are creditors of Gawker Media.
2 Kinja has only a few creditors. And as Your Honor is aware,
3 GMGI is a holding company. How the allocation of the
4 purchase price from Kinja Assets at the Gawker Media assets
5 is allocated will have an implication for the recoveries of
6 creditors of each of those groups. And this was to make
7 clear that, despite the fact that a bidder has to or a buyer
8 has to allocate for Internal Revenue Services one of the
9 aspects of that -- well, that will not be governing the
10 allocations with respect to the proceeds in any subsequent
11 dispute or agreement that we have in the future on that
12 issue.

13 Paragraph E, which is 5.3, just says you're not
14 going to hold an auction. Use your reasonable efforts to
15 have the sale order to be entered by the August 19th date,
16 which we have done by trying to get to Your Honor on an
17 August 18th hearing date.

18 We need to have the bid procedures order. You may
19 recall that there was an original paragraph in the agreement
20 that said that we had to have the bid procedures order by
21 July 5th. This is to confirm that we can get the order
22 today if Your Honor so approves it.

23 It also then on Paragraph 8.1J amends the 19th on
24 the sale order. The rest are -- there are more, but I want
25 to draw your attention to Section 8.3. It does talk about

1 the allowed administrative expense, which Your Honor has
2 raised the question with respect to the super-priority.
3 This is an amendment to the asset purchase agreement.

4 8.3F is also amended for the results of the -- any
5 of the provisions being breached. And it now talks about
6 the liquidated damages clause. Again, Your Honor, the
7 Committee had raised numerous issues regarding the
8 liquidated damage costs, tried to refine it, and refined it
9 to those provisions where --

10 THE COURT: Have you ever seen a bankruptcy
11 transaction like this with a liquidated damages clause?

12 MR. GALARDI: I've been asked that question. I
13 think I had one in my 23 years that had a liquidated damage
14 clause.

15 THE COURT: I've been here 23 years, I've never
16 seen one. And I've done a lot of sales.

17 MR. GALARDI: And I've done a lot of sales too,
18 Your Honor, and I will say I've not seen an agreement that
19 had both breakup fees, expense reimbursement, and a
20 liquidated damages clause.

21 THE COURT: Okay.

22 MR. GALARDI: You will see on Paragraph 8.3G -- K
23 of that, the further amendments with respect to the bid
24 procedures, breakup fees, and then the excluded actions,
25 Your Honor, which I think resolved both Mr. Vassallo's

1 VASSALLO objection as well as the Committee's objection.

2 This is an avoidance. These are the avoidance
3 actions and, in particular, they are -- they were very
4 concerned not only with preference actions but also with
5 intercompany transactions that could be themselves
6 challenged. This paragraph, as far as the excluded actions,
7 reflect those changes.

8 Your Honor, the final place in which there are
9 changes to the documents, although not before Your Honor
10 today, is the actual sale order that was being proposed and
11 we have that. Again, same docket, 77. I have it beginning
12 at Page 105, 154. I don't need to go over these in much
13 detail, other than they reflect conforming changes to what
14 happened with the asset purchase agreement, and the not
15 pursuing it on the 365 --

16 THE COURT: How many (indiscernible) do you think
17 this sale order says the sale's free and clear? I counted
18 11. My general practice is to cross out every paragraph
19 after the first one.

20 MR. GALARDI: And Your Honor, so --

21 THE COURT: That added up to one paragraph.

22 MR. GALARDI: And Your Honor --

23 THE COURT: (indiscernible) liability, I think I
24 counted five.

25 MR. GALARDI: Your Honor, I understand. And,

1 obviously, since we're not putting the sale order before
2 Your Honor, we have ample time to try to get it down to one
3 paragraph, one paragraph that's clear. And I'm sure that
4 this bidder is listening as well as potential bidders --

5 THE COURT: He's standing up. He's going to speak
6 soon.

7 MR. GALARDI: I'm sure he is, Your Honor. And so,
8 Your Honor, we would ask Your Honor with those changes to
9 approve -- and I'm sure the Committee may have some
10 additional comments that they would like to make, but we
11 would like to go forward and we would ask Your Honor to
12 approve the bid procedures.

13 We'd ask Your Honor to approve the amendment to
14 the asset purchase agreement, to reflect the changes to the
15 bid procedures and our obligations to continue to perform
16 under that asset purchase agreement, including the
17 liquidated damages clause changes. We would also ask Your
18 Honor to enter the bid procedures order.

19 THE COURT: Tell me more about what the record
20 reflects about the marketing efforts of this asset.

21 MR. GALARDI: Sure, Your Honor. And Houlihan is
22 available in the courtroom today, and I think --

23 THE COURT: That's (indiscernible) in declaration.

24 MR. GALARDI: Correct, Your Honor. And, again --
25 and I think we mentioned this at the discovery. Until this

1 order is entered, we have been on a -- other than what is
2 set forth in that declaration as to the efforts of Houlihan,
3 once we entered into this agreement we've been in a no-
4 solicit period.

5 THE COURT: But all Houlihan says is it came on on
6 May 15th, it spoke to six people or six entities that the
7 Debtor had a dialogue with. Apparently, there were two
8 bids; they accepted the bid within about 8-10 days after it
9 came on board. And even though the no-shop, no-talk
10 provision didn't take effect until June 10th, there was no
11 evidence that any discussions occurred between whenever they
12 accepted the bid and June 10th.

13 MR. GALARDI: With respect to -- with respect to
14 other bidders or the bid?

15 THE COURT: Other bidders.

16 MR. GALARDI: Your Honor, with respect to the --
17 and, again, we can put the Houlihan person on but --

18 THE COURT: It's your show.

19 MR. GALARDI: That's fine. And give me one second
20 and we'll talk about what we can put up. We'll put on and
21 do it... Your Honor, we're going to put a witness on. Do
22 you want to take a two-minute break and then we can put him
23 on, if that would be...?

24 THE COURT: Sure, sure.

25 MR. GALARDI: Is that cool? Thank you.

1 THE COURT: Sure. Take a two-minute break. Two
2 minutes for lawyers.

3 (Recess)

4 THE COURT: Continue.

5 MR. GALARDI: Your Honor, what we'd like to do is
6 call Mr. Snellenbarger to the stand.

7 THE COURT: Sure. Mr. Snellenbarger?

8 MR. SNELLENBARGER: It's the only place I see.

9 THE COURT: Would you raise your right hand,
10 please? Do you solemnly swear that the motion you're about
11 to give is the truth?

12 MR. SNELLENBARGER: I do.

13 THE COURT: Please take a seat. State and spell
14 your name.

15 MR. SNELLENBARGER: Reid Snellenbarger.

16 MR. GALARDI: Why don't you spell your name? I
17 know we gave it to the court reporter --

18 THE COURT: All right, if the court reporter has
19 it.

20 MR. GALARDI: She did, she got it beforehand,
21 thank you.

22 DIRECT EXAMINATION

23 BY MR. GALARDI:

24 Q Mr. Snellenbarger, would you please tell by whom you're
25 employed?

1 A Houlihan Lokey.

2 Q And how long have you been at Houlihan Lokey?

3 A 11 years.

4 Q And what is your position at Houlihan Lokey?

5 A Managing Director.

6 Q Okay. And Mr. Snellenbarger, what's Houlihan's role
7 with respect to the Gawker Media bankruptcy cases?

8 A We're the Debtor's investment banker.

9 Q And just recently retained, correct?

10 A Correct.

11 Q And when did Houlihan first enter into an engagement
12 letter with Gawker Media and the other Debtors to be
13 retained?

14 A I believe it was May 16th, 2016.

15 Q And what did that engagement letter, in general terms,
16 what did that engagement -- what is your understanding of
17 what that engagement entails?

18 A We were engaged to market and sell the company, as well
19 as explore financing options for the company, primarily.

20 Q Okay. And that was back on about May 16th, you recall?

21 A Correct.

22 Q Okay. And do you have any understanding of why the
23 company sought the services of Houlihan Lokey in particular?

24 A For two things. One, it thought it might have to file
25 bankruptcy, given its current litigation situation, and two,

1 was interested in exploring sale alternatives.

2 Q Okay. And does Houlihan Lokey have a specific group
3 within it that handles media?

4 A Yes, we do.

5 Q And who is in charge of that group?

6 A Mark Patrick Hoff.

7 Q Okay. And has Mr. Patrick Hoff -- let me just go back
8 to this. Have you been directly involved in this
9 engagement?

10 A I have.

11 Q And who else from Houlihan Lokey has been involved in
12 this case, engagement?

13 A My partner, Mark Patrick Hoff, who co-heads the Media
14 Group at Houlihan Lokey, as well as seven other junior
15 professionals.

16 Q Okay, seven others?

17 A Correct.

18 Q Okay. And so when you first got the engagement, what
19 was the direction given to you by the company?

20 A Given the dynamic with the litigation scenarios, the
21 company wanted to immediately explore sale and financing
22 options, DIP financially, potentially, as given the
23 liquidity scenarios that were presented to us, and for a
24 sale, given the potential bankruptcy. It was a collective
25 view that a selecting a stalking horse, and getting to a

1 stalking horse agreement was in the best interest of the
2 company to maximize value.

3 Q Okay. And what did Houlihan do to come up with
4 potential bidders, with respect to the assets?

5 A Well, initially when we were first retained on May
6 16th, we were told that the company potentially would have
7 to file on May 25th, merely nine days from our retention.
8 Given that tight timeframe, we, in consultation with the
9 company, decided it was best to have a targeted process, in
10 which we would reach out to the most, what we felt
11 interested parties, the parties that could move very quickly
12 in order to get to a stalking horse agreement. And that
13 included companies and interested parties that had had
14 previous discussions with the company as well.

15 Q So was your understand that the company prior to your
16 retention had had various conversations with companies.

17 A They have, yes.

18 Q And do you know whether those were with respect to
19 sales of assets or financing?

20 A Both, I believe.

21 Q Okay. But there were companies, to the best of your
22 knowledge, that the company had had contacts with, regarding
23 sales?

24 A Yes.

25 Q So did you contact those parties?

1 A We did

2 Q And did you also add names to that list?

3 A Yes, we did.

4 Q Okay. And so could you tell me, what exactly, over
5 let's say from May 16th to June 10th, when the company
6 filed, what actually activities did Houlihan take on?

7 A We reached out to six third parties, as well as one
8 interested party, and explored a stalking horse agreement
9 for a sale of the entire company. Signed NDAs, we opened up
10 a data room, we explored diligence with all parties.
11 Several of the interested parties hired bankruptcy counsel,
12 in which we explained the process, timing, benefits of being
13 a stalking horse, et cetera. Ultimately, we received a
14 terms sheet from Ziff, the ultimate stalking horse. We felt
15 that was kind of the highest and best offer we'd received at
16 the time, and we immediately began to push forward with an
17 asset purchase agreement with them.

18 Q Okay, so let's cover a few of the points. You said six
19 parties and one interested party.

20 A Yeah, correct.

21 Q Without disclosing what the nature of the interest,
22 what did you mean by an interested party?

23 A A party that already had an interest in the company.

24 Q So by economic interest in the company?

25 A Correct.

1 Q Okay. Now, with respect to the six other parties, what
2 did you do to identify those six parties to say, "These were
3 the most likely candidates."?

4 A A combination of these parties' previous interest and
5 discussions with the company, as well as Houlihan
6 relationships, and our view that given the timeframe, and
7 interest, and best fit, candidly.

8 Q Okay. Now, had all those six parties already had
9 contact with the company, or did you bring some additional
10 parties?

11 A We brought some additional parties as well.

12 Q And how involved was Mr. Patrick Hoff in all of this
13 process?

14 A Very involved.

15 Q Okay. Now, you said you moved and signed NDAs. Did
16 you get six NDAs, do you get five NDAs, or do you have more
17 NDAs, do you recall?

18 A I recall at least three NDAs were signed, I believe.
19 And the remaining conversations were at a high level, to
20 determine their interest.

21 Q Okay. And what did you do with respect to discussions
22 regarding structuring of transactions, and facilitating --
23 given the timeframe, I think you said that you thought the
24 company might have to file as early as May 25th. What did
25 you do to facilitate interested parties' ability to get to a

1 stalking horse agreement and term sheet.

2 A We opened up a data room that was filled with the
3 company's financial records, metrics, et cetera, that
4 summarized the business in its entirety, and also by brands.
5 We had numerous diligence calls, both with the principals of
6 the company, and also legal diligence, to discuss a variety
7 of different issues, in order to get to an agreement.

8 Q Okay. Now, with respect to the data room, was there
9 already a partial data room when Houlihan got on board?

10 A There was, and we had modified it, and effectively
11 cleaned it up for the benefit of this process.

12 Q Okay, and when you say you modified it and cleaned it
13 up, you made it more for a sale process, is that what you
14 mean?

15 A Correct.

16 Q And so do you recall any of the documents, or things
17 you had to put into that data room and created?

18 A Yes.

19 Q And what did you create, or what did you supplement the
20 data?

21 A Financial projects, historical financials, key metrics
22 of the businesses, a variety of different legal agreements.

23 Q Okay. And now what about the structuring of the
24 transaction? You have three entities here. Were there
25 discussions with potential bidders, or thoughts about how to

1 structure the transaction?

2 A Yes.

3 Q And could you describe some of the interaction you had
4 with bidders, or their counsel, and how you proceed in that
5 process, during this period from May 16th to June 10th?

6 A We discussed a variety of different alternatives,
7 whether to acquire, and actually file three entities,
8 acquire the assets, versus acquire the entities of sales,
9 assume liabilities. I think all were obviously concerned
10 about the litigation liabilities. Wanted to be clear that
11 they wanted to acquire the assets, and not take on any of
12 the contingent liabilities. There was also some concern
13 about the Kinja entity, and how to address that during the
14 sale process, which we ultimately were able to resolve.

15 Q Okay. And do you recall how many parties that were
16 interested out of these six actually hired bankruptcy
17 counsel to discuss the potential for being a stalking horse
18 bidder?

19 A I believe three or four of them.

20 Q Okay. And were there parties that said they just
21 weren't interested in being a stalking horse, but they may
22 see us at the auction?

23 A Yes.

24 Q Do you recall how many of the parties were in that
25 category?

1 A At least four of the six.

2 Q Okay. Now, there came a time, did you get term sheets
3 of letters of interest from -- how many people did you get
4 letters of interest or term sheet from with respect to the
5 sales?

6 A Written, two.

7 Q Written, two. And by your purchase "written", were
8 there other oral suggestions of price?

9 A Yes.

10 Q Okay. And how many oral suggestions of what prices
11 they may be?

12 A One other.

13 Q Okay. Now let's break that down. You got two written
14 term sheets. I assume you got one from Ziff Davis?

15 A Correct.

16 Q And Ziff Davis is the -- so you got the one from Ziff
17 Davis, right?

18 A Correct.

19 Q And with respect to Ziff Davis, that's the one that
20 ultimately became an asset purchase agreement, correct?

21 A That's correct.

22 Q Okay. Now in the same time, were you still pursuing
23 term sheets? From the process, from May 25th to June 10th,
24 you were also still seeking term sheets, correct?

25 A Absolutely.

1 Q And did you seek term sheets on higher or better bids,
2 even after you received the Ziff Davis term sheet?

3 A Yes.

4 Q And could you describe at least what you did, even
5 after receiving the Ziff Davis term sheet?

6 A We continued to have discussions with these other
7 parties about trying to push them to the level at which Ziff
8 was, and still trying to convey the benefits of being a
9 stalking horse.

10 Q Okay. Now, obviously you couldn't tell those bidders
11 the purchase price, given the confidentiality of Ziff Davis,
12 so what exactly did you do with respect to the other parties
13 to try to get them to still bid?

14 A Well, one, we kept trying to convey the benefits, just
15 being a stalking horse, being a lead, et cetera. They
16 obviously asked for valuation guidance, and we gave them the
17 general range at which we thought it was appropriate to come
18 in at.

19 Q And with respect to parties in general, what was the
20 valuation guidance that at least Houlihan was trying to get
21 people at, to be a stalking horse?

22 A In the \$90 million to \$100 million range.

23 Q Now, you did receive another term sheet, you said?

24 A Correct.

25 Q Now, and I did want to stay away from confidentiality.

1 But did that term sheet contemplate a stalking horse bid?

2 A Yes.

3 Q Did that term sheet contemplate bid protections?

4 A Yes.

5 Q Okay. Did that term sheet have a higher or lower value
6 than what you obviously got from Ziff Davis?

7 A Lower.

8 Q Would you describe it as significantly lower, or just
9 marginally lower?

10 A Materially enough that we felt the Ziff was superior.

11 Q Okay. And did you still pursue that, despite pursuing
12 Ziff Davis?

13 A We did.

14 Q Okay. Now, you also mentioned an oral offer, correct?
15 Was there ever a number placed on that oral?

16 A Yes.

17 Q And was that substantially, or materially, or however
18 you choose you describe it, higher or lower than Ziff Davis?

19 A It was lower in material enough a way that we felt the
20 Ziff was superior.

21 Q And would that have required bid protections and
22 expense reimbursement?

23 A Yes.

24 Q And with respect to the three offers, and I don't want
25 to use the term too strongly, as formal offers, were the

1 breakup fee and bid protection provisions in the same
2 ballpark?

3 A Yes.

4 Q Now, was Ziff Davis the only one that had the
5 liquidated damages losses?

6 A I believe so.

7 Q Now, did it ultimately come time where Houlihan made a
8 recommendation to the board to pursue the Ziff Davis deal?

9 A Yes.

10 Q Okay. And in making that recommendation, did Houlihan
11 consider the liquidated damages clause?

12 A We did.

13 Q And as you sit here today, would you still recommend
14 it, even though there is still that liquidated damage
15 clause, and even though there is the breakup fee and the
16 expense for reimbursement provisions?

17 A We would.

18 Q And why?

19 A We believe the Ziff Davis, for an overall value for the
20 company, was superior to the other alternatives. And the
21 scenarios in which the liquidated damages would be triggered
22 are very remote, in our view. And therefore given that
23 dynamic, and given the also, then commercial breakup fee and
24 expenses, we felt that that was the -- and candidly, in our
25 view, given the interest we received, we feel we will have a

1 healthy overbid process once we get started, hopefully
2 tomorrow. We felt that it was in the best interest of the
3 company to ride that highest value for a baseline, and given
4 the remoteness of the triggers of the liquidated damages, it
5 was in everyone's best interest to move forward with that.

6 Q Okay, and let me ask you, to the best of your
7 knowledge, does the Ziff Davis document asset purchase
8 agreement have a due diligence out?

9 A No.

10 Q To the best of your knowledge, it does not?

11 A Correct.

12 Q And to the best of your knowledge, does it have a
13 financing condition?

14 A It does not have a financing condition?

15 Q Okay, and how significant was that in your evaluation
16 of the Ziff Davis --

17 A Extreme --

18 Q Let me finish. I know we know each other, so let me --
19 I'll finish my question, then the record, and she will go
20 completely crazy. How important were those two provisions
21 in Houlihan's assessment of this, the Ziff Davis proposal?

22 A Extremely.

23 Q And with respect to the other proposals, were there
24 concerns about financing, closing, or due diligence?

25 A Yes.

1 Q Could you explain a little bit.

2 A The other term sheet we received was contingent still
3 on diligence, on a variety of different factors. Verbal was
4 as well, therefore a real alternative was either we file
5 bankruptcy without a stalking horse at the time, in our
6 view, or we had a full, no diligence, no financing, full-
7 committed deal at \$90 million. And based on that, we felt
8 it was -- our strong recommendation was to move forward with
9 Ziff.

10 Q And what was your recommendation as to filing with or
11 without a stalking horse bid?

12 A We felt it was very important to file with a stalking
13 horse. One, we thought that given the high-profiled-ness of
14 this case, and the situation, we wanted to be clear to the
15 market and to everyone that business was going to continue,
16 and that it was going to, at the very least, to a strategic
17 and safe hands, and we can go on. And we thought that was
18 important for the inherent value of the business. And given
19 what we thought was interest in the asset that we could
20 provide a very good baseline value that people that people
21 could compete against.

22 Q Okay, and as you know, the company filed on June 10th.

23 A Yes.

24 Q And do you recall when the asset purchase agreement
25 with Ziff Davis was actually complete, finalized, and

1 signed?

2 A I believe the day before.

3 Q And up the signing of that document, what did Houlihan
4 do with any other interested bidders?

5 A We continued to have discussions with them, answer
6 questions, provide diligence, et cetera. We wanted to make
7 sure -- even up until the very end, to make sure -- or to
8 try to have backup alternatives just in case the Ziff
9 agreement didn't go through.

10 Q Okay, and at any time other than those six bidder --
11 was there a reason that you only chose the six bidders,
12 other than they were the strategic target? Was there other
13 concerns?

14 A Really, it was based on time perspective. We had very
15 limited time, and we felt that given that, we needed to
16 focus on what we thought were the most logical, most likely
17 candidates to be the stalking horse, and that's why we
18 centered it around those names.

19 Q Okay. Now once the company filed, what has Houlihan
20 done with respect to preparing -- should the Court approve
21 the stalking horse bid procedures, and the order that we've
22 sought to have this Court approve, what has Houlihan done
23 with respect to activity, with respect to the sale process?

24 A We have developed a non-confidential teaser that will
25 be sent to prospective parties. We finalized a

1 confidentiality agreement with counsel. We have prepared
2 many offering memorandum, as well as added to the data room
3 that will be made available to buyers, and prepared a more
4 comprehensive buyers list.

5 Q Okay, so let's talk about that buyers list. When you
6 say a more comprehensive buyers list, how many names, to the
7 best of your knowledge, are now on the buyers list?

8 A Approximately 40.

9 Q 40? Okay. And where did you get those names?

10 A Through a combination of Houlihan and our
11 relationships, general understanding of the market, and
12 discussions with the company and other advisors.

13 Q And I understand you're prepared to go out to them
14 tomorrow -- I may say tonight, but tomorrow, correct?

15 A That's correct.

16 Q Okay. And since the filed, that it announced it was up
17 for sale, have you been contacted by potential bidders?

18 A We have. We've received several inbound calls,
19 probably in the neighborhood of at least 10 to 15 parties
20 have reached out.

21 Q And what have you explained to those parties?

22 A That we were under a no-shop provision currently with
23 Ziff, that we can't engage with them. But once the bidding
24 procedures order is entered, and the no-shop is lifted, we
25 could have further discussions about process, timing,

1 diligence, et cetera.

2 Q And did any of those parties provide a concrete offer
3 well in excess of the \$90 million?

4 A They did not.

5 Q Now, may I take one minute, Your Honor?

6 THE COURT: Yes.

7 Q I guess I'll just sort of tie up one other issue. So
8 we've gone through the no-financing condition, we've gone
9 through the no due diligence condition. Are there other
10 conditions that you've found -- and again, not a test of
11 memory, but are there other conditions that you've found
12 significant about the Ziff Davis deal, or about Ziff Davis
13 that makes this the transactions you believe that should
14 serve as the stalking horse.

15 A Only that they are a strategic party that I think the
16 company would fit well with, I think that was our collective
17 view. They have the financial wherewithal to do the
18 transaction. Aside from the financing and no contingency, I
19 think those are the critical components.

20 MR. GALARDI: Your Honor, I just wanted to note
21 for the record, since I know there's the ongoing litigation
22 about Mr. Denton, I'm not going to go into the process and
23 the roles that he's played in all of this, to obviously stay
24 away from all of those topics, with that. Your Honor, I'd
25 be happy to pass the witness at this point, or --

1 THE COURT: Is there anyone else who wants to
2 question the witness?

3 MR. RUSSELL: Very briefly, Your Honor, William
4 Russell, Simpson, Thacher, and Bartlett, proposed counsel
5 for the committee.

6 THE COURT: Go ahead.

7 CROSS-EXAMINATION

8 BY MR. RUSSELL:

9 Q Good afternoon.

10 A Good afternoon.

11 Q Did you know, did Ziff Davis have any communications
12 with Gawker Media about a potential transaction before
13 Houlihan was retained?

14 A I'm not aware. They may have, I'm just not aware of
15 it.

16 Q You don't know one way or another.

17 A Right, correct.

18 MR. RUSSELL: That's all I have, Your Honor, thank
19 you.

20 THE COURT: Okay, thank you. Does anyone else
21 want to question the witness? Mr. Zipes, I see you rising.

22 Gze Your Honor, Greg Zipes with the U.S. Trustee's
23 office, I just had a few questions regarding the process.

24 CROSS-EXAMINATION

25 BY MR. ZIPES:

1 Q Good afternoon.

2 A Good afternoon.

3 Q As you know, the stalking horse is subject to higher
4 and better offers, right?

5 A Yes.

6 Q And if a higher or better offer comes in that doesn't,
7 for example, include Mr. Denton, that will still be passed
8 on to the board, correct?

9 A Absolutely.

10 Q And just very briefly, state your contact with the
11 board? How is it communicated to the board? And you've
12 mentioned three entities here. Could you identify the three
13 entities that are subject to the sale? And let me just --
14 Kinja KFT, Gawker Media LLC, and Gawker Media Group Inc.,
15 are those the three entities?

16 A Yes.

17 Q And again, my question was, what is the process for
18 communicating offers to the board?

19 A We have a board call and/or meeting in which we will
20 convey the material components of such bids.

21 Q And who sits on the board? Who would be considering
22 the higher or better offer?

23 A The board members.

24 Q And Mr. Denton is a member of the board?

25 A I believe so.

1 Q Okay. And to your knowledge, is he one of the people
2 who would be considering the higher and better offers?

3 A I believe so.

4 Q Are you aware of any procedures in place to recuse him,
5 as appropriate, from any considerations by the board?

6 A I'm not. I'd defer to counsel on that.

7 Q You'd defer to counsel on that? Okay. Thank you, Your
8 Honor, that's all I have?

9 THE COURT: Anyone else want to question the
10 witness? I have a couple of questions. You mentioned three
11 times, I think, that this was a very limited timeframe that
12 you had to work with. In your professional judgment, do you
13 think you could have gotten a higher and better offer if you
14 had more time?

15 MR. SNELLENBARGER: Well, I certainly hope we get
16 one during the overbid process. It's difficult to say.
17 Given what we were based with, we felt very good about --

18 THE COURT: I understand that under the time
19 constraints -- but my question is, if you had more time.
20 Because all this occurred within about 10 days.

21 MR. SNELLENBARGER: Sure.

22 THE COURT: In your view, did the time schedule
23 hamper the ability to get a higher and better offer?

24 MR. SNELLENBARGER: I guess -- it's hard to say.
25 We don't know. I mean, we will know through this overbid

1 process whether it did or not, I would think. Look, I would
2 like to at least have a larger process, prepetition, we were
3 limited, and given the facts, we thought we felt very good
4 about what we did.

5 THE COURT: Did your Houlihan Lokey did any
6 formal, or seat-of-the-pants valuation of the assets that
7 were being sold?

8 MR. SNELLENBARGER: No.

9 THE COURT: You mentioned that you reached out to
10 other parties, in addition to the six that the Debtor had
11 apparently been having a dialogue with, I think dialogue was
12 the phrase in your declaration. Is that correct?

13 MR. SNELLENBARGER: Well, there were a total of
14 seven parties that were contacted during the prepetition
15 process.

16 THE COURT: Where'd you get the names from,
17 though?

18 MR. SNELLENBARGER: From the company, and
19 Houlihan's own relationships.

20 THE COURT: But your affidavit says that the
21 parties that you contacted were the ones that had been in a
22 prior dialogue with the Debtors. Are you saying there are
23 other parties that you contacted?

24 MR. SNELLENBARGER: The Ziff, I think, may be the
25 one where we weren't aware whether they were in prior

1 dialogue or not. So the Debtors had been -- given the
2 relationships with these companies, they might have dialogue
3 for a number of different reasons, not just sale-related.
4 So I think they probably were in dialogue. Whether that
5 constituted sale decisions or not, it's not clear.

6 THE COURT: You also testified, I think your
7 phrase was there would be a healthy overbid process. Does
8 that mean you think the assets are worth more than \$90
9 million?

10 MR. SNELLENBARGER: I would hope so, I believe so.

11 THE COURT: Thank you. You can step down.

12 MR. GALARDI: Can I redirect, just two quick
13 questions? Thank you, Your Honor.

14 RE-DIRECT EXAMINATION

15 BY MR. GALARDI:

16 Q Mr. Snellenbarger, you testified about the period from
17 May 16th to June 10th. Do you believe the process from
18 today to August 15th will give you an ample time to see
19 whether there are overbids?

20 A We do.

21 Q And when you were negotiating the stalking horse bid,
22 did you believe that there would be a post-bankruptcy
23 process in which you could solicit higher and better bids?

24 A We did.

25 Q And do you believe any of the provisions in the asset

1 purchase agreement with Ziff Davis was going to preclude you
2 from getting higher or otherwise better bids?

3 A No, we don't.

4 MR. GALARDI: No further questions, Your Honor.

5 THE COURT: Okay. You can step down, thank you.
6 Anyone else want to be heard on the bid procedures?

7 MR. QUSBA: Afternoon, Your Honor. Sandy Qusba,
8 Simpson, Thacher, and Bartlett, proposed counsel for the
9 creditors' committee. Your Honor, certainly as identified,
10 the exact issues that we've been discussing, negotiating,
11 scrapping about with the Debtors and the stalking horse
12 bidder for the last two weeks. But before getting into it,
13 and kind of giving you what our themes and principles were
14 when we were approaching the stalking horse bid, I do want
15 to address some of the points you made or questions you
16 asked with respect to business judgment, or whether this
17 should be a heightened scrutiny test.

18 With respect to the entry of the stalking horse
19 asset purchase agreement, we're not really taking a position
20 on that, because we've had an opportunity now to look at it,
21 and see the conditionality of it, or the lack thereof, with
22 no financing and diligence outs, and general market terms on
23 conditions. We've looked at the representations and
24 warranties that have to be brought down, and the covenants
25 that have to be adhered to between now and closing. So

1 we're not really taking a position on what tests should be
2 applied with respect to the Debtor's initial entry into the
3 stalking horse arrangement.

4 What we are definitely reserving, and very focused
5 on is the evaluation of any overbids that come in, and the
6 determination as to whether something is a higher or better
7 offer. And our consultation rights are much more meaningful
8 in this particular context because of the insider
9 involvement, et cetera, in this case. And accordingly, we
10 certainly reserve the right, if there's a dispute, and there
11 very well may not be, with respect to the evaluation of a
12 competing bid, to come back and say, "Your Honor, the Debtor
13 thinks this, the committee thinks that." And we'll
14 certainly get into the process, at that point, of how the
15 Debtors made their determination on an evaluation, and how
16 it differs from, or why it should be looked at with a little
17 bit more scrutiny in any particular case.

18 In addition, Your Honor, we were very focused in
19 on letting the buyer universe, the bidders know that in
20 fact, whatever relationship that Ziff Davis, the consulting
21 agreement has with Mr. Denton is meaningless, from a
22 competing bidders' perspective. And so while it was helpful
23 that it was in the motion, we thought it was important that
24 it would be in the bid procedures themselves, because that's
25 what people generally read, particularly competing bidders,

1 or people who are contemplating submitting bids. The
2 liquidated damages provision was certainly something we
3 focused quite a bit on, but let me get to that in a moment.

4 Our principal objectives, Your Honor, when we got
5 to the bid procedures, was to confirm and make sure that the
6 process was designed to encourage participation, because as
7 Your Honor questioned the pre-bankruptcy marketing process,
8 as did we. We were very concerned, when we looked at the
9 application of Houlihan Lokey, and their engagement letter
10 was dated May 15th or 16th, and the bankruptcy filing, and
11 the execution of the stalking horse purchase agreement was
12 June 10th. That's not even 30 days. We were very
13 concerned. We had a lot of dialogue with Houlihan and the
14 company with respect to what exactly their marketing process
15 was, and it was, Your Honor, absolutely consistent with the
16 testimony we just heard as well.

17 Nevertheless, we were very focused on increasing
18 the time period allowed for the marketing process, from what
19 the stalking horse came into court with. And accordingly --
20 and let me back up for a second, Your Honor. One thing that
21 did mitigate some of our concerns was the fact that this a
22 very high-profile case, okay? In the sense that it gets a
23 lot of media publicity and attention. There's no question
24 about it, that people know we're open for business, as far
25 as a sale is concerned. This is not a widget manufacturer

1 in the middle of Nebraska, where nobody knows that it's even
2 up for sale. People absolutely know. So then the question
3 becomes, have we afforded potential bidders enough of an
4 opportunity to conduct diligence? And based on discussions
5 with Deloitte, based on discussions with Houlihan, based on
6 some of the testimony you heard, we thought the marketing
7 process, as much as we could extend it out, would be
8 sufficient to in fact, entice people to participate in the
9 transaction, do their diligence, get it done in a meaningful
10 way, and then provide a bid.

11 So we focused quite a bit on the bid deadline, and
12 in fact got it extended to the dates that Mr. Galardi has
13 already discussed in his remarks. Next, Your Honor, we
14 wanted to make sure that the process wouldn't create
15 unjustifiable administrative claims. And so that's where
16 the liquated damages certainly comes up, as does the expense
17 reimbursement and the breakup fee.

18 On the breakup fee, Your Honor, we did negotiate
19 and attempted to, and were somewhat successful in limiting
20 as to when the breakup fee would be triggered. In essence,
21 it's several different opportunities or events that would
22 trigger the breakup fee. One is a breach of the Debtor's
23 no-shop requirements. And remember, Your Honor, the Debtor
24 has been living under a no-shop provision from the day they
25 executed the asset purchase agreement with Ziff Davis,

1 basically the day before bankruptcy filing, until Your Honor
2 approves the bid procedures if Your Honor is so included.

3 THE COURT: Do you realize, though, that under the
4 no-shop provision, as I read it, which means the Debtor
5 can't solicit or discuss a competing transaction, right? A
6 competing transaction includes a plan. So if the Debtor
7 calls you up and says, "Let's talk about a plan," having
8 nothing to do with the sale, by the way, assuming it's been
9 consummated, they can walk. They earn a breakup fee, and as
10 I read the liquidated damages provision, they also earn a
11 liquidated damages claim.

12 MR. QUSBA: So Your Honor, first the no-shop
13 expires, essentially today, assuming Your Honor enters the
14 bid procedures order.

15 THE COURT: Only for people who sign NDAs, as I
16 read it. It continues until the auction, except to the
17 extent that the bidding procedures provide otherwise.

18 MR. QUSBA: Right.

19 THE COURT: And the bidding procedure, it's really
20 coursing on potential bidders and the ability to get
21 information, but it still binds you, as I see it, up until
22 the auction. You can't even discuss a plan with the Debtor.

23 MR. QUSBA: A Chapter 11 plan.

24 THE COURT: Yeah.

25 MR. QUSBA: Your Honor, given the circumstances

1 that we're in, given the timeline we're talking about --

2 THE COURT: Why is that provision there? Why is
3 that -- why should that be the liquidated damages?

4 MR. QUSBA: Your Honor, so I'm not, first of all,
5 going to defend --

6 THE COURT: You're not the advocate.

7 MR. QUSBA: I am not the advocate of the
8 liquidated damages provision. I have spent the better --

9 THE COURT: But you're standing here, so I'm
10 asking.

11 MR. QUSBA: Absolutely, Your Honor. And I've
12 spent the better part of two weeks together with my partner
13 and colleagues trying to get rid of this liquidated damages
14 provision. What we were able to ultimately do, right--

15 THE COURT: By the way, you've got to pay the
16 liquidated damages within five days.

17 MR. QUSBA: I understand. I don't have to pay,
18 but the estate does, but I appreciate that.

19 THE COURT: Okay.

20 MR. QUSBA: But what we were able to do was
21 severely limit was triggers the liquidated damages
22 provision. And in fact, we got it to the point where we're
23 aligned with the bidder, with the stalking horse bidder, as
24 to when those liquidated damages would be triggered. I'll
25 give you an example. There are basically, I think three

1 circumstances under which, at this point, the liquidated
2 damages are triggered. Believe me, there were a whole host
3 of provisions that triggered it before we got here, a whole
4 host, including the appointment of a trustee, an examiner
5 with enlarged powers. It went on and on and on, and we're
6 down to absolutely three issues, or three events. One is
7 the dismissal of the case, pre-closings.

8 THE COURT: No, merely the making the motion to
9 dismiss without commercially-reasonable opposition. Even if
10 it's not granted. Even if the motion's not granted.

11 MR. QUSBA: I agree, Your Honor.

12 THE COURT: And then they get the breakup fee if
13 the motion is granted, also.

14 MR. QUSBA: If the motion is granted. The chances
15 of them making a motion to dismiss this case, or not
16 vigorously defending against the motion if somebody else
17 made it, I put at a very, very, very low probability.

18 THE COURT: I'm not sure what a commercially-
19 reasonable opposition is, but --

20 MR. QUSBA: But by the way, we reserved rights
21 with respect to fighting about whether a trigger event has
22 occurred in the bid procedures themselves. So there's no
23 question, if it's gray, you can bet the committee's going to
24 be here, and probably shoulder-to-shoulder with the Debtors
25 with respect to that argument. Now, it's not like I relish

1 having arguments in the future, but this is what we were
2 working with, right? We were working with a no-financing,
3 no diligence asset purchase agreement at \$90 million, plus
4 the assumption of basically working capital and other
5 liabilities, right? Against these liquidated damages
6 provisions, expense reimbursements, and breakup fee
7 provisions, and if we could limit their effectiveness, or
8 limit their triggers as much as we could, to the point where
9 we felt comfortable, this isn't going to happen,
10 realistically, and still keep our stalking horse. That's
11 what we valued as a committee, okay?

12 And so the dismissal, the motion, the filing of
13 the motion, or the dismissal itself? The dismissal itself I
14 think triggers the breakup fee, if an order is entered,
15 dismissing the case. And if they file a motion, or don't
16 use commercially-reasonable efforts to defend against one,
17 that would trigger the liquidated damages, right? I, just,
18 having had conversations, I feel pretty comfortable that
19 that's just not in cards between now and what the proposed
20 sale date is.

21 Next, when and if Ziff is finally approved as the,
22 or selected as the winning bidder, then if the Debtors don't
23 proceed to close it, that could trigger the liquidated
24 damages. But that's exactly the circumstance, we're aligned
25 with the company, where Ziff and the creditors' committee is

1 aligned. Once somebody is selected, if it's Ziff, so be it,
2 as the winning bidder, right, we want them to proceed to
3 closing. We want the cash to come into this estate. And
4 again, from our perspective, we were aligned with Ziff in
5 making sure that the Debtors did perform, and the Debtors
6 are telling us it's not an issue. We are, of course, this
7 is our proposal, these are our bid procedures, this is our
8 stalking horse, and if they are the winning bidder, we are
9 absolutely committed to go ahead and continue to close on
10 the transaction.

11 And then the third circumstance is even more
12 remote. Not only has Ziff been selected as the winning
13 bidder, but now a sale order has been entered. And if they
14 don't proceed to closing after the entry of the sale order,
15 again, with Ziff being the winning bidder, then that
16 triggers the liquidated damages. Again, we will be
17 completely aligned with getting this Debtor to close on the
18 transaction once the sale order has been entered. There's
19 some finality to it, there's some definition to it. People
20 know exactly what they have to do, and they're going to do
21 it.

22 THE COURT: But you left out that if the Debtor
23 discusses a competing transaction during this process, that
24 also triggers the liquidated damages, right?

25 MR. QUSBA: If they violate the bid procedures --

1 THE COURT: That last sentence of 5.9(b).

2 MR. QUSBA: Hold on a second, Your Honor, let me
3 get to -- I'm sorry, Your Honor, you are where, exactly?

4 THE COURT: 5.9(b).

5 MAN: Can we have a page number, Your Honor?

6 THE COURT: Well, in the original, I guess in the
7 original contract it's Page 51. I'll read it. It says
8 sellers will not pursue or agree to any competing
9 transaction, other than as expressly permitted by and in
10 accordance with the bidding procedures. So I come back to
11 the question, if you want to discuss a plan with the Debtor,
12 that's a competing transaction, that violates that
13 provision, which triggers the liquidated damages provision,
14 and it also entitles them to a breakup fee. And the
15 Debtor's under a statutory duty to file a plan as soon as
16 practicable.

17 MR. QUSBA: Right, but it's also made --

18 THE COURT: So it's interfering with the Debtor's
19 statutory duties under 1106(8)(5), I think.

20 MR. QUSBA: Well, I'll let the Debtors certainly
21 respond to that.

22 THE COURT: Doesn't the committee have a duty to
23 negotiate?

24 MR. QUSBA: Yeah, and obviously we have been.

25 THE COURT: You have?

1 MR. QUSBA: What's that?

2 THE COURT: You have negotiated a plan?

3 MR. QUSBA: Negotiated a plan? I'm sorry, I
4 thought you said negotiated these provisions. I apologize.
5 No, we haven't negotiated a plan.

6 THE COURT: Sure, that's a violation of the
7 agreement.

8 MR. QUSBA: Don't enter the bid procedures order,
9 Your Honor, it's not liquidated damages yet. No, we have
10 not negotiated a plan. But the Debtors have obviously come
11 into this Chapter 11 proceeding having made a business
12 judgment that the liquidation of the company, as opposed to
13 a reorganization -- a liquidation through the sale of the
14 company, as a going concern, is, in their business judgment,
15 the best way to proceed. Right now, as far as the
16 creditors' committee is concerned, give the potential
17 preservation of jobs, given the preservation of trade credit
18 and the like, and bringing cash proceeds into the estate,
19 we're of a like mind. We're of a like mind. We have no
20 reason to suggest that there should be a reorganization as
21 opposed to a 363 auction process, the way these guys have
22 teed it up, these guys meaning the Debtors, I apologize.

23 So from our perspective, yes, they have an
24 obligation to propose a Chapter 11 plan, right? But they
25 also, they have some, obviously, a fair amount of leeway

1 within the Bankruptcy Code itself with respect to what's in
2 the best interest of this estate. They made a judgment,
3 that an auction and a 363 is in the best interest of the
4 estate. Right now, we're not challenging that. We're not
5 challenging that. They also were able to secure DIP
6 financing from a third-party source that didn't tie the
7 Debtor's hands with respect to a bunch of milestones in the
8 APA, et cetera, or when that has to close in order to
9 circumvent, or create further friction, with respect to
10 enticing participants to come in and bid on these assets.
11 So from that perspective, again, there are benefits to this
12 stocking horse arrangement.

13 So Your Honor, again, we come back to -- we were
14 not happy with the liquidated damages provision, absolutely
15 not. Would we rather see it go away? Absolutely. But we
16 made a judgment as to when we'd lose the stalking horse
17 itself, and that we didn't want to do, right? That we
18 valued. And so we ended up continuing to whittle away,
19 whittle away, whittle away, as far as we could take it, with
20 respect to the stalking horse, and getting the liquidated
21 damages to circumstances we just didn't think would happen.
22 It would be nice in the winter, from our perspective. And
23 by the way, Your Honor, one other thing that should be
24 noticed. The liquidated damages are not included in the bid
25 procedures in the sense they're not included as a hurdle for

1 the --

2 THE COURT: (Indiscernible)

3 MR. QUSBA: I mean, that would be off the charts.

4 So the initial bid has to clear the breakup fee and the
5 expense reimbursement, but we were absolutely cognizant that
6 it could not chill other bidders. And we're pretty
7 comfortable, given the circumstances that it's triggered, it
8 has nothing to do with other bidders, and enticing people to
9 come back into the process. All right, Your Honor, you've
10 heard testimony about -- I can't remember the exact numbers,
11 10 to 15 inbound calls to Houlihan Lokey. The committee has
12 also received inbound calls from potential bidders. And
13 we've created a dialogue, and started a dialogue with an
14 inbound bidder ourselves. We've also, the Debtors and their
15 professionals have also shared the buyers list, the teaser,
16 and they will be sharing the confidential information
17 memorandum as well, and taking our input with respect to
18 that.

19 So we're very focused on making sure that the
20 process is fair, it's level, it entices people to come in.
21 We were very focused, obviously, on not creating
22 administrative expenses, if this thing goes completely in
23 the wrong direction. And accordingly, we tried to limit the
24 liquidated damages provision. And Your Honor, one of the
25 other fundamental principles we had was making sure -- and

1 Mr. Galardi talked about it and discussed it while he was
2 standing here at the podium, and that was with respect that
3 making sure that causes of action that could inure to the
4 benefit of unsecured creditors weren't being sold for really
5 no consideration to the stalking horse bidder or quite
6 frankly, anyone else. And accordingly, we spent a lot of
7 time on excluded assets, and basically causes of action.

8 And particularly, Your Honor, per the Debtor's own
9 public filing, there have been some quote-unquote "inter-
10 company loans" made on the eve of bankruptcy to insiders, to
11 Mr. Denton. That has obviously raised flags for us. We are
12 very focused on, and will continue to do a substantial
13 amount of diligence with respect to transactions that
14 occurred (indiscernible) year, two years before the
15 bankruptcy filing itself. We are very focused on inter-
16 company transactions. And all those claims, cases of
17 action, et cetera, are ring left behind, and not being taken
18 by Ziff Davis, and presumably anybody who overbids them,
19 unless they obviously pay very handsomely for them, and
20 we're satisfied with the payment that we receive. So in
21 short, Your Honor, we were very focused with respect to
22 that, on maintaining those causes of action with the estate.
23 And the DIP order also dovetails into that with respect to
24 standing, et cetera, and because we do view that, in
25 addition to the asset sale process, as a way to augment the

1 size of this estate, as a potential way to augment the size
2 of this estate.

3 Lastly, Your Honor, we're also very focused on
4 making sure this sale closes, whether it's with Ziff Davis,
5 or a higher and better bidder. And we're focused, and we're
6 having dialogue with Ziff right now, through counsel, and we
7 will have it with anybody who participates in the auction.
8 And that is, to make sure that any defamatory, tortious
9 content that's currently on the web pages today is taken
10 down, in connection with the sale, so their objections
11 aren't filed through the sale, et cetera. And the stalking
12 horse has been amenable to having that discussion. We
13 expect other parties to as well. But again, we're very
14 focused on having a sale conclude, and conclude in a manner
15 that maximizes value to the estate.

16 And if we can get rid of objections on the way
17 there, we're going to try, and that's one of the things
18 we're certainly focused on, is trying to make sure that any
19 buyer takes down allegedly defamatory statements or content,
20 and doesn't inherit a lawsuit the day after they close. I
21 think that's in everyone's interest. Your Honor, I'm happy
22 to answer any questions you may have, additional questions
23 about any particular provisions in the bid procedures, the
24 amendment to the asset purchase agreement, sale order, any
25 of the four documents Mr. Galardi --

1 THE COURT: Well, I do have a question.

2 MR. QUSBA: Sure.

3 THE COURT: You're not the author of this one --

4 MR. QUSBA: I'm happy to answer it anyway.

5 THE COURT: Since you've invited the question,
6 (indiscernible).

7 MR. QUSBA: Sure.

8 THE COURT: This is the application --

9 MR. QUSBA: I'm sorry, Your Honor.

10 THE COURT: This is the application, Paragraph 11.
11 The last sentence says, pursuant to the stalking horse APA,
12 the stalking horse bidder will be entitled to receive credit
13 for the full amount that the stalking horse bid protections
14 at the each round of the auction. How does that work?

15 MR. QUSBA: So again, I think what they're asking
16 for is basically credit bidding, in essence, their breakup
17 fee and expense reimbursement.

18 THE COURT: But how could they credit bid if they
19 don't get it, if they're the winning bidder? They don't
20 earn the breakup fee until somebody else wins the auction.

21 MR. QUSBA: I agree with that, I agree with that.
22 But if somebody overbids them on that, right? If somebody's
23 competing with them, they're going to have to cover the
24 breakup fee and expense reimbursement, agreed? I mean,
25 that's just part of the bid procedures.

1 THE COURT: I don't know. They could make a
2 higher and better offer that may not cover the breakup fee
3 in this particular case. It's a cash deal, so it doesn't
4 matter. But the point is, people who are bidding should be
5 bidding apples to apples, and then the Debtor and the
6 committee just take into consideration which is the higher
7 and better offer in light of the breakup fee, that's all.

8 MR. GALARDI: I don't know how you credit bid a
9 fee you don't owe. And Your Honor, I've done this, so
10 here's the example, and Your Honor's question's a good one.
11 But whenever I do an auction with a breakup fee is, you look
12 at what the net value of the estate is.

13 THE COURT: Right.

14 MR. GALARDI: Where this comes into play is on the
15 fourth bid. It always happens this way, right? So you have
16 a bid, you get a million dollars, so then the overbid has to
17 cover that breakup fee. So the second --

18 THE COURT: Well, as a practical matter, of
19 course.

20 MR. GALARDI: As a practical matter. So all that,
21 whether you call it a credit bid, or whether they get credit
22 for it, and I think the phrase may get misstated, it's
23 simply to say the Debtors will view every bid in the
24 successive bid process, what will be the net yield to the
25 estate? What ends up happening is, if you have an increment

1 of \$1 million, and you have an initial bid, an overbid, Ziff
2 Davis comes back, that means the fourth bid's going to have
3 to be very high, because it's not just the million.

4 THE COURT: But that's a decision you make. So if
5 the fourth bid is only \$1 million, and the breakup fee is \$4
6 million, you just say, "That's not a higher and better bid,"
7 that's all.

8 MR. GALARDI: And that is the paragraph, that's
9 the point of that paragraph.

10 THE COURT: But in other words, they're not
11 getting a credit, it just comes into the consideration for
12 it.

13 MR. GALARDI: Well, I've been in situations where
14 we didn't have that language, and then the bidders will
15 complain, "No, you got to look at the number," which doesn't
16 make any sense to me.

17 THE COURT: But I've seen auctions where the
18 highest number isn't the highest and best bid --

19 MR. GALARDI: Correct, exactly.

20 THE COURT: Because you're getting notes, you got
21 to pay a breakup fee, or any other reason. But that's just
22 part of the (indiscernible) and what goes through your head
23 when you decide what's higher and better.

24 MR. GALARDI: And most bidders have asked us to
25 articulate it, and I think with respect to Ziff Davis and

1 most bidders that I have dealt with, like to say it this way
2 so that it's absolutely clear that when we go to determine
3 highest and otherwise best bid -- and let's assume an all-
4 cash deal -- you are deducting that amount. So there's no
5 ambiguity. I usually start my auctions making that
6 absolutely clear on the auction, that when we consider it in
7 consolation with the committee, we're looking at the net
8 value to (indiscernible).

9 THE COURT: That makes sense. But when you say
10 credit bit, that triggers a certain, (indiscernible).

11 MR. GALARDI: (Indiscernible) secured creditors
12 putting their thing, that language will be modified.

13 THE COURT: Because they haven't earned that until
14 you've selected somebody else. So you can't credit bid it.

15 MR. GALARDI: Correct. We should modify it.
16 Correct, I understand that.

17 THE COURT: I was just wondering the way it works.

18 MR. GALARDI: Yes, that's how it works. The words
19 are unfortunately.

20 THE COURT: All right, I have the same question in
21 every case.

22 MR. GALARDI: Hopefully you get similar answers.
23 Maybe not the same answers.

24 MR. QUSBA: Your Honor, I think you had also made
25 some points about the super-priority claim status. From the

1 committee's perspective, whether it's an admin claim or
2 super-priority, it's above us, clearly, and --

3 THE COURT: Well, but you are subordinating your
4 claim (indiscernible).

5 MR. QUSBA: Oh, there's no question about it. But
6 we would, if it was just an admin claim or not. You mean
7 our professional piece?

8 THE COURT: (Indiscernible), yeah.

9 MR. QUSBA: I understand. We appreciate that.

10 THE COURT: And there may be trade vendors out
11 there who don't know it, but they're subordinating their
12 claims to that.

13 MR. QUSBA: We appreciate that.

14 THE COURT: (indiscernible) provision, which has
15 never been noticed.

16 MR. QUSBA: We appreciate that.

17 THE COURT: Okay.

18 MR. QUSBA: Thank you, Your Honor.

19 THE COURT: Go ahead.

20 MR. ZIPES: Greg Zipes, with the U.S. Trustee's
21 office. I have a few comments that may or may not be
22 helpful to this process, but we've heard today about certain
23 provisions that -- protections that Ziff Davis has
24 requested, one of which is the no-shop, and the trigger for
25 that. And there's been some testimony today, just to avoid

1 any issues down the road, litigation issues, maybe a
2 representation from Ziff Davis that nothing's happened to
3 date. Assuming this Court approves the bid procedures
4 today, nothing to date has triggered that provision.
5 There's been talk on the record that the Debtor has heard
6 from other bidders, and has maybe discussed it with other
7 bidders, and it's an invention, potentially, for unnecessary
8 litigation. So I think that should be a consideration in
9 the proving it.

10 And as for the dismissal, the provision that if
11 the case is dismissed, the Debtor has fiduciary obligations,
12 obviously. And I agree that this provision is unusual. I
13 can't think of a scenario where it's in the Debtor's
14 fiduciary obligations to support dismissal, but that could
15 happen, down the line.

16 THE COURT: And I've seen a lot of cases where
17 Debtors move to dismiss the case.

18 MR. ZIPES: And so Your Honor, I would just say if
19 this provision is approved, then maybe an additional
20 provision, a fiduciary out of the Debtor would also be
21 approved for that, or that this part of the provision not be
22 approved. I appreciate that the Debtors, even though there
23 was no testimony on this, the Debtors apparently will ensure
24 that Mr. Denton is appropriately recused in any discussions
25 with the board. There was no testimony on this, the witness

1 didn't know one way or the other, but I think the Debtors
2 would be willing to make that representation. And finally,
3 Your Honor, my office would like to hear if there is a
4 bidder that's been turned down for whatever reason, we're
5 not necessarily going to second-guess that, we just want to
6 hear what happened in that regard, and we'll be in touch
7 with the Debtor regarding that as well.

8 THE COURT: Okay. I don't know if that's for the
9 courtroom.

10 MR. ZIPES: Excuse me.

11 THE COURT: I don't know if that issue is for the
12 courtroom to discuss, why someone was turned down.

13 MR. ZIPES: We'd like to just know what the
14 process was, and that's not something that (indiscernible).

15 THE COURT: The process in short, whatever it was.

16 MR. ZIPES: Thank you, Your Honor.

17 THE COURT: Anybody else? You know, I guess you
18 can -- yes, sir?

19 MR. GALARDI: I had one more representation to put
20 on the course, I thought Mr. Torkin was getting up, and
21 would be in the line of fire. But two things, Your Honor.
22 One, you raised the statutory, fiduciary duty to negotiate a
23 plan. I don't think --

24 THE COURT: To file a plan.

25 MR. GALARDI: To file a plan.

1 THE COURT: As soon as practicable.

2 MR. GALARDI: And as soon as practicable within
3 the timeframe. The Debtors have made a decision that what a
4 plan would look like is after the sale. As I had mentioned
5 to the committee counsel, that said, we're always willing to
6 consider, and since they're bound by a confidentiality
7 agreement and we are, we believe we can have such
8 negotiations.

9 THE COURT: (Indiscernible), and I don't even know
10 why that kind of a discussions triggers liquidated damages.

11 MR. GALARDI: It shouldn't. But again, the fact
12 of the matter is, I don't believe it does --

13 THE COURT: So you and I agree on that, then?

14 MR. GALARDI: We do agree on that one, Your Honor.
15 And now maybe Mr. Torkin will rise.

16 THE COURT: I'm not sure he's a party in interest
17 in the case.

18 MR. GALARDI: I understand that. And with respect
19 to the one, again, subject to Your Honor approving bid
20 procedures, there's always the adequate assurance of future
21 performance with respect to a property. There is a --

22 THE COURT: Two days it not enough.

23 MR. GALARDI: And we've agreed with the landlord.
24 What we've agreed to the landlord is -- look, in the
25 process, it's always my practice, and Houlihan has been

1 advised that any bidder who is going to make a bid, as soon
2 as we know, be advised that they're going to have to prepare
3 adequate protection and future performance materials, if
4 they want this lease.

5 THE COURT: Yes, it's any executory contract.

6 MR. GALARDI: It is any executory contact, but the
7 one that is the most critical is obviously the real estate
8 lease. But second is what we advise -- and again, subject
9 to Your Honor, is we will provide that information as soon
10 as we get it. Obviously, when we go into the auction, we
11 will have that information. Since the bid deadline is
12 August 15th, we'll provide it on August 15th, subject to
13 Your Honor's willingness to consider this.

14 With respect to the 5th Avenue lease, what we've
15 said is we don't have any issue to their coming to a hearing
16 on a sale, if we're trying to proceed to actually assume and
17 assign that lease on that day, with them raising any
18 objections at that time. What my has generally been is it's
19 not something that necessarily has to be done, or we have an
20 objection, that matter gets put over for a separate hearing.
21 I think with those representations, counsel, to that
22 landlord, is comfortable with the process, and we're just
23 going to play it out. We hope that there is somebody, for
24 the reasons Your Honor noted on the DIP, we would rather
25 have somebody take this lease, not cash collateralize the

1 LC, have it returned, give them 18 months' security, and
2 have them be free and clear of this lease.

3 MR. HOFFMAN: Your Honor, Trevor Hoffman from
4 Haines and Boone, and I am here on --

5 THE COURT: (Indiscernible)

6 MR. HOFFMAN: That's right, yes. On behalf of the
7 landlord on the 5th Avenue lease, and Mr. Galardi's
8 representations are correct. Obviously, we are highly
9 concerned that two days is not enough on adequate assurance,
10 and my view is that if there is a bidder who seeks to have
11 the lease assigned to them, what would probably make the
12 most sense is that we arrive at the hearing and kick that
13 particular issue to a future date, to allow us to talk to
14 them, negotiate with them, and see if we can come to a
15 resolution.

16 THE COURT: Okay.

17 MR. HOFFMAN: Thank you, Your Honor. The one
18 other thing I'll say while I am here, is on this issue that
19 you have raised as to the super-priority status for the
20 breakup fee, et cetera. As a potential admin claimant, that
21 certainly would be a major concern to my client.

22 THE COURT: Okay. Anyone else? As my questions
23 indicated, I have problems with the -- not with the
24 transactions, so much as some of the things that are
25 attached to the transaction. I don't have a problem with a

1 stalking horse contract, even if the property might be worth
2 a little more, I recognize the value of having someone on
3 the hook, particularly one who doesn't require due diligence
4 or financing. I don't have a problem with the breakup fee
5 or the reimbursement. It's certainly reasonable. I don't
6 have a problem with Ziff Davis, but I have two problems with
7 this, two overriding transactions.

8 The first is that based upon the evidence, it
9 doesn't appear to me that the asset was properly marketed,
10 or sufficiently marketed. You've heard Mr. Snellenbarger
11 try and defend the time constraints that were imposed upon
12 him, but the impression I had from his testimony is if he
13 had more time, he could have gotten a better deal. Houlihan
14 Lokey was retained on May 16th. According to his
15 declaration, he contacted a target group of is potential
16 bidders who were already in a dialogue with the Debtors. In
17 his testimony, he suggested that he contacted other people,
18 but it's not clear.

19 Two of those six submitted term sheets the week of
20 May 22nd, which is anywhere from about 8 to 10 days after
21 Houlihan Lokey got into the process. Three others expressed
22 interest. The testimony now, or the representations now are
23 that there are 40 potentially interested parties that
24 Houlihan Lokey targeted, and presumably could have been
25 targeted if it had more time. 10 or 15 have reached out to

1 Houlihan Lokey expressing an interest, and the committee has
2 represented that it received calls from interested parties.
3 So -- and maybe that can be resolved if there is sufficient
4 amount of time for parties to now get in and do due
5 diligence.

6 But the other problem I have, and it's been the
7 subject of some testimony, is this liquidated damages
8 provision. Mr. Galardi and I have combined our 46 years of
9 experience, and we have concluded, or at least he's told me
10 he's seen it once. I've never seen it, which suggests to me
11 that it's an unusual provision, which in and of itself, I
12 suppose doesn't condemn it, but it gives me pause. I note
13 that the liquidated damages provision is triggered if
14 somebody makes a motion to dismiss the case -- and this is a
15 change from the original provision -- if somebody makes a
16 motion to dismiss the case, and the Debtor doesn't oppose it
17 in a commercially-reasonable fashion, even if the motion is
18 denied, if somebody else opposes it -- following, by the
19 way, in that circumstance, if the case is dismissed, Ziff
20 Davis not only gets the liquidated damages, it also gets its
21 breakup fee. I don't know why it gets both. Similarly, it
22 gets its breakup fee and liquidated damages if the Debtor
23 pursues or agrees to a competing transaction, which includes
24 a plan with the creditors' committee.

25 Furthermore, as I pointed, all of the fees

1 included the liquidated damages gave a superiority. I don't
2 see any basis in the bankruptcy code for that. It's
3 prejudicial to potential administrative creditors. This is
4 a new provision that's not been served on notice to anybody.
5 I've heard one landlord, of the 5th Avenue location, say
6 that it's a concern to it, and I don't know defaults are
7 properly cured, if there are administrative expenses that
8 have to be paid ahead of these defaults.

9 So I'm not going to approve these procedures with
10 that liquidated damages provision in it, nor would I approve
11 an agreement which included that the definition of a
12 competing transaction that included, for example, the
13 discussion of a plan that had nothing to do with the sale
14 itself. I think it's an overly-broad and draconian penalty
15 provision. It's highly unusual, and I would not approve an
16 agreement with that. For all of those reasons, I will deny
17 the motion to approve the bid procedures.

18 MR. GALARDI: Your Honor, what I would ask for is
19 a 10-minute break, to come back?

20 THE COURT: Sure.

21 MR. GALARDI: Thank you. Oh, Mr. Torkin.

22 MR. TORKIN: Your Honor, can I be heard?

23 THE COURT: You can, but I'm not sure you're a
24 party in interest.

25 MR. TORKIN: A prepetition executory contract.

1 THE COURT: So? I haven't approved it.

2 MR. TORKIN: A party -- pardon me?

3 THE COURT: So?

4 MR. TORKIN: It's a valid, prepetition --

5 THE COURT: It's not anything until it's approved
6 by the Court. But come on up. It's late.

7 MR. TORKIN: Thank you, Your Honor. I appreciate
8 Your Honor understanding that he liquidated damages
9 provision in this context is unusual. The facts of this
10 case are unusual, at least from a buyer's perspective, and a
11 strategic buyer's perspective. We were called on before the
12 case to put together a bid with a great deal of uncertainty
13 as to what was happening with the litigation with Mr. -- with
14 Terry, I forget his last name.

15 MAN: Bollea.

16 MR. TORKIN: Bollea. My apologies. Our big
17 concern, Your Honor, is this could be a one-issue bankruptcy
18 case for Mr. Denton to get a windfall, and that would be
19 inappropriate, and therefore entitle us to liquidated
20 damages. If, for example, we were to commence the case, and
21 we were to settle the issue with Mr. Bollea for \$10 million,
22 \$15 million, much less than the value of the litigation --
23 because as well all, know, these estate law litigations,
24 they can be reduced to any number. There's tremendous
25 equity value in this case. It was our view that the equity

1 holders in this case believed that there was lots of equity
2 value, and any liquidated damages would be coming out of
3 their ultimate recoveries. So we were concerned that they
4 file for bankruptcy, use our deal as leverage, and say,
5 "This thing is being sold. If you don't settle now, this is
6 done." He settles the case, he dismisses the case, he
7 pursues a plan, he does whatever.

8 And so we targeted very specific liquidated
9 damages at a number that is far inside what we would have
10 ever believed anyone to view as a draconian liquidated
11 damages provision, to guard against the possibility that the
12 agreed-upon formula to preserve value and to provide value,
13 which we believe it ultimately going to go to equity. All
14 due respect to Sandy, and the committee for looking after
15 unsecured creditors, and they have complicated litigation
16 claims that they ultimately have to liquidate, but there's
17 no debt here that is significant, in the context of the bid.

18 THE COURT: So why do you need a super-priority
19 claim? (Indiscernible).

20 MR. TORKIN: Your Honor, I could without the --
21 overzealous lawyering, I could live without -- a super-
22 priority claim is not going to be the end of the day for us,
23 but the liquidated damages here served a very specific
24 purpose in a very unique circumstance for a one-issue case,
25 which is what we have always called it, a one-issue case, a

1 \$140 million judgment that could be liquidated to \$20
2 million. The committee's agreed with it. They understand
3 the circumstance on why we (indiscernible) so specific --
4 now let me just, I actually not, as liberal -- you're doing
5 me a greater service, or maybe a disservice, because you're
6 about to deny the motion. Maybe I'm going to convenience
7 you otherwise, but I don't believe that we can --

8 THE COURT: Is the motion for reargument on the
9 record?

10 MR. TORKIN: It is a motion for reargument, then.

11 MR. GALARDI: As a formality, I'll make the motion
12 for reargument, Your Honor. (indiscernible) Mr. Torkin.

13 MR. TORKIN: The idea is if the buyer terminates
14 pursuant to X, Y, and Z, you get X. I don't believe you can
15 double-dip on the breakup fee and the liquidated damages.

16 THE COURT: Well, your contract provides for that.

17 MR. TORKIN: Well, I'm not so sure, because there
18 are very limited circumstances -- and we could go through
19 them and clarify it. We could go through there, I'll grab
20 my agreement -- but if we terminate for a specific reason,
21 then we get liquidated damages, and then on the breakup fee,
22 I believe it says other than bankruptcy-related default,
23 which is a defined term, in the liquidated damages section,
24 we went through with Simpson Thacher very carefully --

25 THE COURT: So if your concern is that equity is

1 going to get more than -- it might be easier to get more, so
2 why don't you take your liquidated damages after the
3 creditors have paid in full, with interest, and before
4 equity gets a distribution?

5 MR. TORKIN: Because we negotiated for liquidated
6 -- we negotiated this specific issue, for liquidated
7 damages, and the -- one other piece, on the competing
8 transaction, our view is it's a competing transaction with
9 respect to the acquired assets. It says that at the end.
10 If it wasn't clear, and it seemed sort of overly-ambitious,
11 our view of the they can't discuss a plan, of course they
12 can discuss a plan to liquidate the proceeds from the bid
13 procedures. But what they can't do is discuss a plan, and
14 entertain offers and bids that it outside of the parameters
15 for which we agreed. We wanted specific performance, Your
16 Honor. If they dismiss the case, we went through
17 complicated negotiations to see whether or not there was an
18 ability for us to get (indiscernible), because we want the
19 asset. And that would have been better than liquidated
20 damages, from our perspective, and we didn't think that that
21 was workable.

22 And in terms of the bid procedures order, when the
23 committee came to us and asked us not to assume the
24 contract, but to call out specific provisions, we also put
25 in place the specific performance, because we're not

1 interested in liquidated -- I will stipulate today that Ziff
2 Davis does not want liquidated damages, they want Gawker and
3 the business. So the hope is by far, to close the
4 transaction and win, not to get \$13 million, and having put
5 yourself out there. We're strategic. We're not a hedge
6 fund, we're strategic. Strategic -- frankly, Your Honor, it
7 is a disincentive bankruptcy for a strategic to show up
8 before the case, subject itself to a higher and better
9 offer, go completely naked on process until a bid procedure
10 is entered, 20 days in the case, to reach out to employees,
11 to say that we are there, and want this business, and then
12 to turn them down on bid procedures, and in a very unique,
13 (indiscernible), generous, one-issue bankruptcy case, on the
14 liquidated damages, tailored very specifically, very
15 specifically to deal on process. That's a disincentive for
16 strategics to come in. So that's my perspective.

17 THE COURT: Yes, sir.

18 MR. QUSBA: Your Honor, Sandy Qusba, Simpson,
19 Thacher, and Bartlett, again. I'm not sure I agree with all
20 of Mr. Torkin's characterizations, this is a one-trick pony
21 case, and things of that nature. The equity's in the money,
22 this, that, and the other thing. We have very different
23 views with respect to that, but that's neither here nor
24 there, that's just to clear the record. But for example,
25 Your Honor, and what Mr. Torkin, how he explained what's

1 motivating liquidated damages provision is really almost a
2 penalty vis-à-vis the equity.

3 THE COURT: It's a penalty, it's not a liquidated
4 damages claim.

5 MR. QUSBA: But it's a penalty vis-à-vis, really,
6 the equity. That's what he's concerned about, that's what
7 he said.

8 THE COURT: Not if the Debtor's insolvent, it's a
9 penalty for the unsecured creditors.

10 MR. QUSBA: No, I'm saying what he said. He's
11 concerned that Mr. Denton does something, or the equity, the
12 board does something here, right, that results in a
13 dismissal of the case, and he's out as a strategic, and he's
14 kind of been made to look silly. And so remember, there are
15 three boxes, right? There are three boxes in this Chapter
16 11 case. One is the top box, the Inc., the parent company,
17 it's just a holding company, and then there's Media, LLC,
18 and then there's Kinja, right, where assets reside. So we
19 would be perfectly happy or prepared to -- if the liquidated
20 damages provision was really a disincentive to equity, then
21 put the claim up at the top box, right? Because that would
22 structurally subordinate that claim to all unsecured claims.

23 THE COURT: Thank you. I'll give you the last
24 word on your motion to reargue.

25 MR. GALARDI: I've made the motion to reopen, Your

1 Honor, and we would again, I think there's a few things. I
2 think you did hear testimony -- well, with respect to the
3 process, Your Honor, no one is denying that the process with
4 short, but I think that's the bankruptcy process -- nor is
5 the process necessary to be done. Really, the adequacy is
6 what's the post-bankruptcy process.

7 THE COURT: Well, the process is short, but that's
8 curable if you have time at the other end.

9 MR. GALARDI: And I think everybody's agreeing
10 that the testimony is that the period from here through
11 August 17th, August 18th -- August 15th is the bid deadline
12 -- is an adequate period of time. Nobody has said
13 otherwise. And indeed, that has to be balanced -- and this
14 was made very clear to the committee, and I think they
15 agreed, we've lost sight of a couple things. If we don't
16 have a stalking horse, this is a very mobile workforce with
17 employees. It was very important to send exactly the signal
18 that we do have a stalking horse deal. So it is absolutely
19 critical that we have the stalking horse deal, which is why
20 Houlihan worked so hard in those days to get what we think
21 is a fairly exceptional deal, both in a bad sense with the
22 liquidated damages clause that offends Your Honor, but
23 actually in the more positive sense, a \$90 million, no
24 contingency, no financing offer. So to walk out of here
25 without a stalking horse agreement to approve is going to

1 create -- and again, we don't have another agreement to back
2 up, it's going to create a major problem at the company.

3 THE COURT: Why not just put the company up for
4 auction? The same day, with a reserve, and see what comes
5 in?

6 MR. GALARDI: Two things, Your Honor. One is,
7 that process doesn't get us an agreement. Two, advertisers,
8 as we explained the first day, don't know where this
9 company's going to be. I don't know whether we have a DIP
10 lender, because part of the terms are that they know that
11 they're getting paid off. We also have a second lien
12 lender, which we've primed, in part because we have this
13 offer. So the consequences of not having a bidder, which
14 are all the things that we considered in this process. So
15 we really come down to what your provisions are that I
16 believe you said are putting you to the edge of denying the
17 motion, and now reconsidering it. One is the liquidated
18 damages. I heard Mr. Torkin say move it from a super-
19 priority claim to an administrative claim. We certainly
20 would support that, and I think --

21 THE COURT: (Indiscernible) structurally
22 subordinate it, but putting it to (indiscernible).

23 MR. GALARDI: Your Honor, again, we had this
24 discussion. The committee raised it, Mr. Torkin raised it,
25 if that solves the problem --

1 THE COURT: Although there'll probably be a joint
2 plan with one class, and it would get paid as a priority
3 claim anyway.

4 MR. QUSBA: I'm sorry --

5 MR. GALARDI: Well, it doesn't, actually, Your
6 Honor, the way the assets flow, because of the way in which
7 the money flows. Your Honor, if that resolves the issue, I
8 can talk to, and I forgot to introduce you to Ms. Dietrich,
9 who is the general counsel and president, is in the
10 courtroom today. I can talk to the counsel. I don't
11 believe that that's an issue. If that's really the way it
12 goes -- because again, as I had convinced both the
13 committee, and I think otherwise, there is no reason that
14 you would dismiss this bankruptcy case unless somebody gave
15 you so much more money --

16 THE COURT: So why is the provision in there?
17 You're carrying that risk.

18 MR. GALARDI: Because I think -- well why are we
19 willing to take the risk?

20 THE COURT: They're not, you are.

21 MR. GALARDI: We're willing to take the risk
22 because we know we're not doing it. He's not willing to
23 take the risk, because he's afraid that there will be a
24 settlement. I think that's pretty clear. If solving the
25 liquidated damages clause and getting this done means that

1 that claim is only payable by Gawker Media Group, Inc.,
2 we're prepared to do that. I'm not sure that that solves
3 everybody's problems, but again, if the concern is he wants
4 a penalty on equity, we're not going to take the action, his
5 concern is the creditors, that's fine, you can put the
6 liquidated damages clause there.

7 THE COURT: If the creditors are willing to take
8 the risk that even if it's an unsecured claim, the Debtor is
9 insolvent, and you suddenly have another \$13.5 million
10 claim.

11 MR. QUSBA: At the parent company, Your Honor?

12 THE COURT: Well, I don't know where it's going to
13 be --

14 MR. QUSBA: But Your Honor, if we do it at the
15 parent company, we're certainly prepared, because the --

16 THE COURT: What if it's not? What if it's at the
17 operating company?

18 MR. QUSBA: Then it becomes -- again, we
19 negotiated what we did, Your Honor.

20 THE COURT: I guess I didn't see that distinction.
21 Was the (indiscernible) just against the (indiscernible)
22 company?

23 MR. QUSBA: No, no, that was my suggestion, based
24 on Mr. Torkin saying --

25 THE COURT: Then I don't understand. You're

1 saying that you didn't have a problem with it as a super-
2 priority, but now you're saying it's got to be an unsecured
3 claim or whatever at the holding company.

4 MR. QUSBA: No, no.

5 THE COURT: Let me save the talk. You want to
6 talk about it, fine. The one that that I've been convinced
7 of is this is not a liquidated damages clause, because the
8 purpose of a liquidated damages clause is to provide for
9 damages where actual damages can't be revenue-determined.
10 This is a clause to deter or to prevent equity from getting
11 a windfall in the event it settles principal litigation. If
12 you want to make it an unsecured claim, that's certainly
13 better than a super-priority claim that has to be paid in
14 five days. I didn't hear the committee having a problem
15 with it, unless it's at the holding company level, but I
16 don't understand why that distinction, since it wasn't a
17 problem when it was a super-priority claim, period.

18 And I didn't mention it, but under the Lionel
19 factors which govern this, you've failed to sustain your
20 burden of showing that this is an appropriate exercise of
21 business judgment. One factor is that the proportionate
22 value of the asset (indiscernible) -- to consider the
23 proportionate value of the asset, of the estate as a whole,
24 in a related issue of whether or not there are appraisals.
25 All I'm told is, is that this was done quickly, in eight

1 days, and Mr. Snellenbarger said that he predicts a healthy
2 overbid process, which suggests that the property is worth
3 more than the stalking horse bid. I realize there's value
4 to a stalking horse bid. But those are two Lionel factors.
5 Another factor is the amount of the elapsed time since the
6 filing. This is a quick sale. Virtually no time has
7 elapsed. As a matter of fact, the APA dated the date of the
8 filing of the petition.

9 Another factor is the effect of the proposed
10 disposition on future plans of reorganization. This
11 forecloses all other future plans of reorganization. It's a
12 liquidation at that point. The most important factor is
13 whether the asset is increasing or decreasing in value.
14 There's been no evidence on that point at all. So under the
15 Lionel standards, which I failed to mention, but were
16 subsumed in my comments, you failed to sustain your burden
17 of proof. If you want to come back with another deal,
18 whether in 10 minutes, tomorrow, or next week, that's fine.
19 But as the deal stands, I'm not going to approve the bidding
20 procedures for the reasons I've stated. Anything else?

21 MR. GALARDI: Your Honor, well -- Your Honor, I'd
22 like to have a 10-minute recess.

23 THE COURT: (Indiscernible)

24 MR. GALARDI: (Indiscernible) I think the Lionel
25 factors, I think we have evidence, but I will --

1 THE COURT: But we can address -- that's my
2 conclusion, and I don't know if it's a final order, whether
3 you can appeal it, but that's my conclusion.

4 MR. GALARDI: Thank you, Your Honor. I'd ask for
5 10 minutes?

6 THE COURT: Sure.

7 (Recess)

8 THE COURT: Please be seated.

9 MR. GALARDI: Your Honor, I have the privilege of
10 making another motion for reconsideration at this time.

11 THE COURT: Why don't you just tell me what the
12 story is, straight.

13 MR. GALARDI: And here's the transaction, and
14 here's where we changed. First of all, with respect to the
15 liquidated damage provision, to address Your Honor's
16 concerns. The liquidated damage clause will be solely the
17 liability of Gawker Media Group, Inc., and therefore it will
18 actually be structurally subordinated to the claims of
19 unsecured creditors. In this case, we don't believe there
20 are any creditors, and as Your Honor will recall, the assets
21 are being sold at the two other entities. So I believe
22 that's acceptable to the committee, and also to Mr. Torkin.

23 I'm going to make the representation that the
24 Debtors have not violated the non-solicitation, and I
25 believe Mr. Torkin is going to confirm that he is waiving

1 today any possible claim for breaches of the no-shop, no
2 solicitation clause as of today. We will be able to begin
3 shopping as of today. With respect to the interplay between
4 the breakup fees and with respect to the liquidated damages,
5 there will not be a payment of both in any circumstance.
6 We're going to go back to the docket and make sure that that
7 is absolutely clear, so that it is one or the other under
8 the circumstances, and when the liquidated damages clause is
9 to be paid, it will be paid out of GMGI. Again, I think
10 it's an extremely remote circumstance. I believe that was
11 the substance of the changes we would propose --

12 THE COURT: And the definition of competing
13 transactions?

14 MR. GALARDI: Oh, right. You're right, and with
15 respect to the definition of competing transaction, both the
16 Debtors and the committee will be able to pursue the filing
17 of a plan, pursuing a plan, negotiating a plan, and to
18 propose a plan as soon as practicable in those circumstance.
19 That will relate to the breakup fees, and if we were to walk
20 away (indiscernible), but that will be embedded into the
21 breakup fee provision, should we do a plan in lieu of a sale
22 of this scenario.

23 THE COURT: Is that acceptable to the bidder?

24 MR. TORKIN: Yes, Your Honor. Michael Torkin,
25 Sullivan Cromwell, for Ziff Davis. I agree, I just want to

1 make sure we're all clear on the competing transition piece.
2 We are going to make it clear that they can discuss the
3 contours of a plan, providing that it's in the context of
4 the process of bidding procedures. But whatever plan they
5 want to talk about, that's fine, as long as it complies with
6 our procedures.

7 THE COURT: Why don't you just say that any plan -
8 - first of all, they can talk about whatever they want. But
9 if they propose a plan, it has to be consistent with your
10 rights under the APA?

11 MR. TORKIN: Correct.

12 THE COURT: All right. (Indiscernible).

13 MR. QUSBA: Thank you, Your Honor, and that works
14 for us. I think the suggestion was made on the record
15 before we left, and people thought about it and agreed with
16 respect to the claim being at the parent company.

17 THE COURT: All right, with those corrections,
18 I'll approve the bidding procedures order. I'll so order
19 the record, but what I suggest you do is you give me -- at
20 this point it's not even a blackline copy, but just give me
21 a copy of the bidding procedures order, with the bidding
22 guidelines, and to the extent that there are modifications
23 with the APA, rather than modify the APA, just state in the
24 bidding procedures order that notwithstanding anything to
25 the contrary in the agreements, these are the rules. All

1 right?

2 MR. GALARDI: That's fine, Your Honor. With your
3 so ordering, we also understand that we can begin
4 solicitation immediately, and we will get an order to you as
5 soon as we can.

6 THE COURT: Okay, thank you. Anything else?

7 MR. GALARDI: No, but thank you again for your
8 accommodation.

9 THE COURT: Thank you.

10 MR. QUSBA: Thank you, Your Honor.

11 (Whereupon these proceedings were concluded at 4:59 PM)

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I N D E X

RULINGS

Page Line

| | | |
|--|----|-------|
| Case Management Motion Approved | 17 | 3 |
| Cash Management Motion Approved | 17 | 16 |
| Wages Motion Adjourned | 19 | 8 |
| Taxes Motion Approved | 19 | 24 |
| Insurance Motion Approved | 19 | 24 |
| Critical Vendors Motion Approved | 22 | 18 |
| DIP Motion Approved | 37 | 20-24 |
| Interim Compensation Motion Approved | 23 | 3 |
| Prime Clerk Retention Application Approved | 27 | 3 |
| Opportune Retention Application Approved | 30 | 10 |

| | | | |
|----|---|-----|----|
| 1 | Ropes & Gray Retention Application Approved | 31 | 10 |
| 2 | | | |
| 3 | Houlihan Lokey Retention Application | 33 | 13 |
| 4 | | | |
| 5 | Motion to Approve the Bid Procedures Approved | 122 | 18 |
| 6 | | | |
| 7 | | | |
| 8 | | | |
| 9 | | | |
| 10 | | | |
| 11 | | | |
| 12 | | | |
| 13 | | | |
| 14 | | | |
| 15 | | | |
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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
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